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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1105

JOSEPH CLINTON McBRIDE,

Petitioner,

—against—

WILLARD SMITH, Commandant, United States Coast Guard,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that Court entered November 23, 1966. Such judgment affirmed the denial of petitioner's motion for summary judgment and the dismissal of his complaint. The complaint alleged that the refusal of respondent, the Commandant of the United States Coast Guard (the "Commandant"), to validate petitioner's merchant mariner's document denied rights guaranteed by the United States Constitution and was not authorized by statute.

Citations to Opinions Below

The opinion of the District Court is reported at 248 F. Supp. 459 and is printed in Appendix A, page 1a. The opinion of the Court of Appeals is reported at 369 F. 2d 65 and is printed in Appendix B, p. 25a.

Jurisdiction

The judgment of the Court of Appeals was entered on November 23, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1964).

Questions Presented for Review

1. Whether the refusal of the Commandant to issue a validated merchant mariner's document required for employment on United States merchant vessels deprives the applicant of liberty and property without due process of law, in violation of the Fifth Amendment, and abridges freedoms protected by the First Amendment, where the Commandant's decision is based upon the applicant's beliefs and associations and

(a) the applicant's participation in Communist Party activities is limited to activities in support of the Party's lawful objectives;

(b) there is no evidence (apart from participation in these activities) showing that he had a specific intent to advance illegal objectives of the Party or had beliefs that might lead him to engage in espionage or sabotage.

2. The regulations setting forth the criteria for determining whether a specially validated merchant mariner's document shall be issued require the Commandant to determine whether he is satisfied that the applicant's presence on shipboard would not be "inimical" to the security of the United States. The Commandant is required to base his determination on five kinds of information, only one of which—membership in or "sympathetic association" with

organizations on the Attorney General's list of subversive organizations—is present in this case. Are these regulations unconstitutionally vague under the Fifth Amendment,

(a) because of the uncertainty inherent in the basic standard,

(b) because of their failure to provide criteria for determining when an applicant's relation to a listed organization requires denial of a merchant mariner's document, and

(c) because they direct the Commandant to consider not simply membership but also "sympathetic association" with listed organizations?

3. Whether by enacting the Magnuson Act, which gives the President general authority to issue "rules and regulations" to safeguard vessels, harbors, ports and waterfront facilities against injury "from sabotage or other subversive acts, accidents, or other causes of a similar nature" but which contains no reference to a screening program, Congress authorized the creation of a screening program which

(a) restricts an individual's liberty and brands him a security risk on the basis of his beliefs and associations; and

(b) employs procedures which depart in several significant respects from traditional norms of fair procedure.

Constitutional Provisions, Statutes and Regulations Involved

The First Amendment to the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of

grievances." The Fifth Amendment provides: "No person shall . . . be deprived of . . . liberty, or property, without due process of law. . . ."

The statute involved is the Magnuson Act, 64 Stat. 427 (1950), 50 U. S. C. § 191 (1964). The regulations involved are 33 C. F. R. §§ 6.10-1, 6.10-3, 6.10-9 and 121.01 through 121.29. The statute and regulations cited above are set forth in Appendix C, p. 33a.

Statement of the Case

Petitioner, a merchant seaman, on July 10, 1959 applied to the Commandant for special validation of his merchant mariner's document (R. 348; J.A. 117a).* Coast Guard Regulations require the possession of a specially validated mariner's document as a condition for employment on a merchant vessel of the United States of 100 gross tons or more. 33 C. F. R. § 121.01(a).

On October 15, 1959, without issuing the special validation, the Commandant sent petitioner twenty-four interrogatories (R. 352-55) relating, *inter alia,* to membership in and political activities on behalf of the Communist Party. On March 29, 1960 petitioner submitted his answers (R. 357-61, J.A. 124a-128a).

Thereafter on November 23, 1960, the Commandant denied the application because he was not (R. 341; J.A. 107a):

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* "R" refers to pages in the record below. "J.A." refers to pages in the Joint Appendix.

"... satisfied that your character and habits of life are such as to warrant the belief that your presence on board vessels of the United States would not be inimical to the security of the United States."

On December 22, 1960 petitioner answered and requested a hearing (R. 346-47; J.A. 113a-15a).

Thereafter, on November 28, 1962 and May 14, 1963, a hearing was held before the Hearing Board of the Third Coast Guard District. The Board was composed of a representative of the Coast Guard (who served as chairman), a management representative, and a labor representative—each of whom was designated by the Commandant* (33 C. F. R. § 121.13; R. 241, 328). Early in the hearing, petitioner's counsel objected to the proceedings on the grounds that they were not authorized by statute and that they violated petitioner's constitutional rights (R. 254).

The Government's principal witness was John Lautner, a member of the Communist Party from 1929 to 1950 (R. 263; J.A. 39a), who had testified about the affairs of the Communist Party "at about 90 cases, procedures, hearings involving Communism and 20 Smith Act cases" (R. 267; J.A. 45a). Lautner had served prior to 1950 as a member of the National Review Commission of the Party which had charge of maintaining Party discipline (R. 261, 263; J.A. 36a, 39a) and as security officer of 35 East 12th Street (R. 261; J.A. 36a), the building which formerly housed the National, State and County headquarters of

* The management and labor representatives are chosen by the Commandant from panels of persons named by the Secretary of Labor to represent management and labor respectively. 33 C. F. R. § 121.13.

the Communist Party (R. 260; J.A. 35a). He identified petitioner as "the elevator man" at this building (R. 260; J.A. 35a). Lautner testified that to hold his position as elevator operator petitioner would have to have been "checked out" as a Party member, but conceded that he had "no personal knowledge" whether petitioner was a member (R. 261-62; J.A. 37a). Lautner left the building in January, 1950 and never saw the petitioner there at any time thereafter (R. 262; J.A. 38a).

Lautner testified that petitioner was a "manual worker," a "rank-and-filer," not a "party functionary" (R. 263-64; J.A. 40a). He testified that as a "rank-and-filer" petitioner's normal activities would be to "Attend branch meetings, pay duties [sic], accept assignments and make reports of assignments" (R. 264; J.A. 40a). While he disclaimed any knowledge of the particular activities of petitioner's branch, he stated that branch assignments were peaceable actions of the organization designed to recruit members into the Party (R. 264; J.A. 41a).

Lautner further testified that branch activities did not include "efforts to commit espionage, sabotage or other crimes" (R. 264; J.A. 41a). He added (*ibid.*):

> "On the basis of my experience, that was completely separate and apart from the political structure of the Communist Party. I think it would be foolish on the part of the party to concern itself with that type of activity and jeopardize the status of the party. That was something separate and apart from the Communist Party organization."

Lautner also testified as to the Communist Party's position on Negro rights. He stated that it took a strong posi-

tion against racial discrimination and that he "often wonder[ed] why the Party failed to attract Negroes in the ranks of the Party" (R. 272; J.A. 51a). He thought the explanation was that "Negro people are religious people. They're beyond Marxism". (*ibid.*). He stated that the Party's activity in the Negro rights area had declined in the 1950's due to the attacks on the Party, but that a rank-and-file Negro member might infer that the reason for the decline was a lack of interest in racial discrimination (R. 273; J.A. 52a).

Lautner testified that Camp Midvale was a "Communist front" and that Wingdale Lodge was a "party camp" with "the proceeds or profit" going to the Communist Party. Camp Midvale, he stated, was a summer camp "for Party people sympathizers or anyone that wanted to go out there" (R. 273; J.A. 53a). He had never attended Camp Midvale and consequently did not know what went on there (R. 274; J.A. 54a). He stated that at Wingdale Lodge, also known as Camp Unity, there were lectures on the Communist point of view and Party literature was sold (*ibid.*).

A second Government witness,* Fenton Thomas Scholl, an agent of the Federal Bureau of Investigation, testified that he had interviewed petitioner on two occasions in 1961 (R. 275; J.A. 56a). Scholl tesitfied that petitioner had admitted that he was a former member of the Communist Party and had attended Party meetings in various apartments in the late 40's and early 50's (R. 276; J.A. 57a). He stated that petitioner had given as his reason for joining that he believed the Party to be an "organization which

* There was one other Government witness, Frank Ernest Borzage (R. 255-59), who was called to lay the foundation for the admission of Gov. Exs. F, G, H and I (R. 362-69).

would help the Negro race" (R. 276; J.A. 57a) and that petitioner had said he had quit the Party about 1957 "realizing that they were not to help the Negro race" (R. 276; J.A. 57a). Scholl added that he had "no personal knowledge that he has been a member since that time" (R. 278; J.A. 60a).

The remainder of the Government's case consisted of various exhibits. Among these exhibits were photostatic copies of pages from the Kings County and New York County Register of Voters for various years to show petitioner's registration as a member of the American Labor Party (R. 362-69); photostatic copies of nominating petitions to show that petitioner signed nominating petitions for Communist Party and Peoples Rights Party candidates (R. 370-72); and a photostatic copy of pages from the Guide to Subversive Organizations and The Attorney-General's List of Subversive Organizations to show the allegedly subversive nature of the May Day parade in New York City, the International Workers Order, the National Negro Labor Council and Wingdale Lodge (R. 281, 373-78).

The Government also introduced the questionnaire filed with petitioner's application and the answers to interrogatories, previously referred to (R. 348-50a, 356-61; J.A. 117a-22a, 125a-29a). The former disclosed petitioner's membership in the International Workers Order (R. 350a; J.A. 121a). In the latter petitioner admitted that he had been a member of the Communist Party, had signed a Communist Party nominating petition, had attended various Communist Party conventions in 1957, had participated in May Day parades in 1951 and 1952, had participated in a Communist Party election campaign in 1942, had been present at Camp Unity on the Labor Day weekend in 1946 and in the summer

of 1952, had been present at Camp Midvale in 1955, had participated in raising funds for the defense of Ferdinand C. Smith in 1948, had registered his affiliation with the American Labor Party from 1949 through 1954 and had signed an American Labor Party nominating petition in 1951, had signed nominating petitions for Peoples Rights Party candidates, had authorized use of his name in an amicus brief in connection with an appeal by Morton Sobel from his conviction for conspiracy to commit espionage, and had been employed from 1948 through 1959 by the 1213 Realty Corp., 35 East 12th Street, New York City (R. 356-61; J.A. 124a-29a).

Appellant took the stand and testified under oath that he was born in Paradise, Florida, on May 31, 1911, one of ten children (R. 304; J.A. 79a). His parents were turpentine workers and migratory farm laborers. For the first 17 years of his life he lived in conditions that he described as "chattel slavery" (R. 305-06; J.A. 81a). His only education in Florida was about three years at a biblical school where "They had a biblical minister who would read the bible to you" (R. 305; J.A. 80a). There was no "reading or writing or that sort of thing" (*ibid.*). After some traveling and working as a migratory farm worker he moved to New York in 1932 (R. 305-06; J.A. 81a).

In 1936 petitioner joined the Communist Party (R. 307; J.A. 82a). He explained the circumstances of his joining as follows (*ibid.*):

> "I know very well how it happened. The first time I heard about the Communists they were supposed to help the cause of the Negro. They were supposed to help the cause of the Negro. They were supposed to represent a kid on Eastern Parkway in Brooklyn, and

these people had a commission to get legal advice, a defense for this man. I never knew the man, but the white people were supposed to help the rights of the Negro. So that I hung around with these people for two or three months, never even knowing who the Communists were. I thought the Negroes spoke a foreign language to me because I didn't understand them. And there was a girl there with a white sheet, and I recall that she was moving around saying that we have to help the Negro. That is why I joined."

He testified that he left the Party in 1957 because he had discovered as he had grown older that the Party had done nothing to defend the rights of the Negro people (R. 307, 308; J.A. 83a). He added that he had found that the Communist Party discriminated against Negroes themselves (R. 317; J.A. 93a). Petitioner testified that after leaving the Party he had attended NAACP and CORE meetings and made donations (R. 323; J.A. 99a).

He stated that when he left the Party, so far as he was aware, only his local branch knew that he had stopped being a member (R. 314; J.A. 90a). He testified that he had not attended any Party meetings since leaving the Party or associated with any members of the Party other than some who had left the Party before he did (R. 315-16; J.A. 91a).

Petitioner described his Party activities as consisting of (R. 307; J.A. 83a):

"General political work, picketing, passing out leaflets, selling the Daily Worker, worked at rallies, setting up chairs, laying out tables and all that sort of thing."

He denied having ever engaged in espionage, sabotage or any other form of unlawful or violent activity on behalf of the Party (R. 307-08; J.A. 83a). Petitioner further denied knowing of any acts of espionage or sabotage engaged in by the Communist Party during the time he was a member (R. 308; J.A. 83a). Although he did state that he learned that the Communist Party advocated the overthrow of the present form of government, he did not concede that he would, while he was a member, have participated in a revolution (R. 312; J.A. 88a). He strongly affirmed, however, that he would now fight against the Communists (*ibid.*). He stated that he did not know of and did not participate in efforts by Communist leaders to interfere with shipping in the early days of World War II (R. 312-13; J.A. 89a). He further declared that if he had been told to commit sabotage " . . . I wouldn't have joined the party. I wouldn't do it" (R. 324; J.A. 100a).

Regarding his employment as an elevator operator petitioner testified that he got the job in 1948 in answer to an ad in the paper and worked there until August 4, 1960 (R. 313-14; J.A. 89a). He also stated that he had been employed for two months in 1950 by the Communist Party in organizing a peace demonstration (R. 322; J.A. 97a), and in 1954 or 1955 had gone to a picnic at Camp Midvale (R. 317; J.A. 93a).

Petitioner further testified that he learned to read and write from a member of the Party after he joined (R. 309, 320; J.A. 84a, 96a), and that in the process of learning to read and write, he took a course at the Jefferson School for a period of four or five weeks on "the principles of Marxism and Leninism and the Negro question. . . ." (R. 309, 310; J.A. 84a, 85a). He stated that he was taught

that full citizenship for the American Negro could be accomplished by Negroes and Whites fighting for legislation giving equal rights to Negroes and Whites (R. 309-10; J.A. 85a). When asked whether he was required to learn the principles of Marxism he responded (R. 310; J.A. 86a):

> "If I could absorb Marxism or Leninism I wouldn't be with people of my calibre. Why, I couldn't even pronounce the names that were mentioned or read to us by some one in the study group and explained to us."

Petitioner testified that no revolutionary tactics were taught him at the Jefferson School (R. 322; J.A. 98a).

When questioned further concerning the principles of Marxism, petitioner emphasized that he did not understand the meaning of it. He equated Marxism with the "Equality of man" and said he had been taught that "the capitalistic system was dying" and that "there would be a bloodless revolution" (R. 318; J.A. 94a). He added (*ibid.*): "I'm not familiar with Marxism and Leninism. All I was interested in was in the equality of man."

He stated that he had taken the same position as others in the group regarding the Korean War, that is that the American people ". . . should not get involved in another war," but that he now saw things differently (R. 319; J.A. 94a-95a).

Finally, petitioner expressly affirmed that his only loyalty today was "To the United States" (R. 323; J.A. 99a).

Petitioner called two witnesses on his behalf. The first, Miss Patricia Buitoni, stated that she had known petitioner since 1947, that she knew he had been a member of the Communist Party and believed he had joined because

he thought the Party "did fight for Negro rights. . . ." (R. 287-88; J.A. 63a). She stated that so far as she knew this was his only interest in the Party (R. 288; J.A. 63a). She confirmed that petitioner had left the Party in 1957 because he had come to realize that the Party was not fighting for Negro rights—and that they never had (R. 292; J.A. 67a). She further confirmed that his present associates were not Party members (R. 293; J.A. 67a-68a). She stated that she had never known petitioner to commit a crime, that his reputation in the community was good and that "He certainly doesn't have any loyalty to anything else but the United States" (R. 288; J.A. 63a). Miss Buitoni stated that she had attended May Day parades and had visited the Harlem Communist Party Headquarters but that she was not a member of the Communist Party and had not attended Party meetings (R. 290-91, 294; J.A. 64a, 68a).

Petitioner's second witness was Mr. Ed Woodhead, a bookstore employee. He stated that he had known petitioner for three years and that he had met him frequently during that time (R. 295; J.A. 70a). Mr. Woodhead, who is white, testified that he had also been born and raised in the part of Florida where plaintiff spent his early life (R. 296-97; J.A. 71a-72a). He described the conditions for a Negro there at that time as "abysmal" (R. 298; J.A. 73a) and stated that he believed petitioner had joined the Communist Party because it seemed to offer an answer for the discrimination he found both in Florida and, to a degree, in the North (R. 296; J.A. 71a). He thought petitioner had left the Party because of "general disenchantment" and because he had come to feel that non-communist organizations such as the NAACP and CORE might have a better

answer to the race problem (R. 299, 303; J.A. 75a, 77a). He further testified that petitioner was regarded in the community as "a good wholesome patriotic citizen," not a "wide-eyed radical" (R. 298-99; J.A. 74a), and that he had never known petitioner to be involved in any espionage or sabotage, but only in activities "devoted entirely to internal United States politics, with the primary objective of racial equality" (R. 299; J.A. 74a). He concluded that he could not imagine petitioner performing any act inimical to the interest of the United States, and that, in his opinion, petitioner was completely loyal (R. 299; J.A. 75a).

On July 2, 1963 the Hearing Board recommended to the Commandant that petitioner not be issued a validated merchant mariner's document (R. 388-412). Its report to the Commandant made 25 findings of fact and included an extensive resume and analysis of the evidence. Petitioner was not furnished a copy of the recommendation nor was he informed of any decision of the Hearing Board until the Government filed the Board's recommendation with the district court as part of the administrative record.

Without any opportunity for the submission of briefs to or oral argument before the Commandant, the Commandant, on October 14, 1963, notified petitioner that his application was denied (R. 231-33; J.A. 29a-34a). The findings of the Commandant in support of his conclusion were as follows (R. 231-33; J.A. 29a-34a):

> "1. You were, from 1936 until a date no earlier than 1957, a member of the Communist Party which has been designated by the Attorney General, pursuant to Executive Order 10450, as amended.

"2. For more than twenty years, beginning in 1936 when you joined the Communist Party, you were knowingly and sympathetically associated and affiliated with the Communist Party as demonstrated by your active participation in the Communist Party and in Communist Party-inspired organizations and activities:

"(a) In the late 1930's you attended a school which in your testimony you identified as 'the Daily Worker School known as the Jefferson School' and which you admitted was maintained by the Communist Party, and where you were taught the principles of Marxism and Leninism.

"(b) You signed a Communist Party nominating petition in 1939 and participated in the 1942 Communist Party election campaign.

"(c) In 1946 and 1952 you attended Camp Unity Wingdale, N. Y., a Communist Party enterprise with proceeds or profits going to the New York State Office of the Communist Party, and where Communist Party literature was sold and distributed and those in attendance were indoctrinated with the philosophy of the Communist Party. In 1955 you attended the same Camp then operating under the name Wingdale Lodge.

"(d) In 1955, you were present at Camp Midvale, N. J., which was attended by sympathizers of the Communist Party.

"(e) You assisted for two months in organizing the 1950 May Day Parade, New York City, and participated in the 1951 and 1952 Parades.

"(f) In the years 1949 through 1954, you registered voting affiliation with the American Labor Party in Manhattan, and in 1951 you signed an American Labor Party nominating petition.

"(g) In 1957, you signed a People's Rights Party nominating petition for Elizabeth Gurley Flynn, a candidate for public office of the City Council, Borough of Manhattan. Elizabeth Gurley Flynn was convicted of conspiracy to violate the Smith Act of 1940 in the United States District Court (S. D. N. Y.) on 21 January, 1953.

"(h) From 1941 until its dissolution in August 1954, you were a member, and attended meetings, of the International Workers Order, which has been designated by the Attorney General, pursuant to Executive Order 10450.

"(i) You attended, in 1957, the New York State Communist Party Convention, the Communist Party National Convention and various other Communist Party Conventions.

"(j) You were a member of the East Side Branch, New York City, of the Communist Party, and in the late 1940's and early 1950's you attended meetings of the Branch; on behalf of the Communist Party you did engage, in your own words 'in general political activity, picket, hand out literature, sell the Daily Worker, and work at rallies'. The Daily Worker was the chief journalistic mouthpiece of the Communist Party.

"3. You claim to have left the Communist Party in 1957. However, the record establishes that after that

date your activities were such as to support the conclusion that you continued to be a member of, or knowingly and sympathetically associated and affiliated with, the Communist Party. From 1943 until 1960, you were employed at 35 East 12th Street, New York City, at which address were housed the Headquarters for the National Committee, and the State and County Headquarters, of the Communist Party, the Daily Worker, the Freiheit (a Communist publication), and the warehouse for pictures and literature of the Communist Party. The record contains credible testimony that such employment would not have been available to a former Communist who had broken with the Communist Party.

"4. Your conduct as above described indicates that you were well indoctrinated in and fully realized, accepted, and approved the aims and objectives of the Communist Party, including the overthrow of the present form of government in the United States by force and violence and Communist domination of the world.

"5. During the course of the Hearing you testified that you joined the Communist Party because you had heard that the Communists would help the cause of the Negro. Your testimony that in the 1940's and again in 1951 you became disillusioned with the Communist Party because you felt 'they were not alert and on the ball on the Negro question' is negated by your continued association with and participation in the Communist Party and its activities long afterwards."

Pursuant to 33 C. F. R. § 121.23, petitioner took an appeal from the Commandant's decision to a board composed of a

representative of management, a representative of labor and presided over by a representative of the Coast Guard, in this instance an officer in the Coast Guard (R. 417, 421-22).* On February 20, 1964, the Appeal Board sent its recommendation to the Commandant that the appeal be denied (R. 413-415). No copy of the recommendation was furnished petitioner nor was he afforded an opportunity to submit arguments to the Commandant.

On March 3, 1964, the Commandant informed petitioner that after reviewing the recommendation of the Appeal Board he had "affirmed" his decision of October 14, 1963 refusing to issue a validated document (R. 235; J.A. 34a).

Having exhausted his administrative remedies, petitioner filed a complaint in the United States District Court for the Southern District of New York on May 15, 1964 (R. 1-30). The complaint was grounded on the First, Fifth and Sixth Amendments to the United States Constitution, 50 U. S. C. § 191 (the Magnuson Act), and 28 U. S. C. §§ 1331 and 2201 and prayed for a judgment declaring that the Commandant's acts were unconstitutional, an injunction against carrying out his decision and interfering with petitioner's employment, and a court order directing the Commandant to approve the application for validation endorsement (R. 11-12). On August 3, 1964 the Commandant answered, denying the essential allegations of the complaint (R. 31-33).

Thereafter, on May 14, 1965, petitioner moved for summary judgment under Rule 56, F. R. Civ. P. (R. 34). On December 15, 1965, the District Court denied petitioner's

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* The members of the Appeal Board, like the members of the Hearing Board, were designated by the Commandant as provided in 33 C. F. R. § 121.23(a).

motion for summary judgment and entered judgment dismissing the complaint (R. 227; J.A. 27a).

On January 20, 1966 petitioner, pursuant to 28 U. S. C. § 1291 (1964), appealed to the United States Court of Appeals for the Second Circuit.

On November 23, 1966 the Court of Appeals affirmed, holding that:

> (1) as interpreted and applied the regulations were not unreasonable (365 F.2d at 68-69);
>
> (2) the evidence supported the Commandant's finding that petitioner "fully realized, accepted, and approved" the objectives of the Communist Party, including the violent overthrow of the United States Government (365 F.2d at 68);
>
> (3) as construed by the Commandant to require "knowing" membership, 33 C. F. R. § 121.03(e) was not unconstitutionally vague (365 F.2d at 69);
>
> (4) the screening program was authorized by the Magnuson Act (365 F.2d at 69).

The Court distinguished *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966), on the ground that it involved the "interpretation of criminal statutes, and the specific intent necessary for a constitutionally based conviction" while the issue in the instant case was one of "the reasonableness of regulation of employment in a peculiarly sensitive area. . . ." (365 F.2d at 68).

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided important questions of Federal constitutional and statutory law which should be settled by this Court.

I

This case presents important unresolved constitutional issues as to the nature of the evidence required to justify the exclusion of an individual from his chosen occupation because of his beliefs and organizational activities.

By refusing to validate petitioner's merchant mariner's document, the Commandant has deprived petitioner of the opportunity to engage in his chosen occupation on all American vessels of 100 gross tons or more. 33 C. F. R. § 121.01 (a). The facts relied upon by the Commandant (R. 231-33; J.A. 29a-33a) involved, without exception, petitioner's exercise of his First Amendment rights. As this Court has repeatedly recognized, exclusion from a profession or trade because of beliefs and associations tends to discourage the exercise of these constitutional rights. E.g., *Keyishian* v. *Board of Regents*, —— U. S. ——, 35 U. S. L. Week 4152, 4157 (Jan. 23, 1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961).

Statutes and regulations which deny employment to knowing members of the Communist Party, without any showing of a specific intent to further the Party's unlawful aims, unconstitutionally abridge the freedom of association guaranteed by the First Amendment. *Keyishian* v.

Board of Regents, —— U. S. ——, 35 U. S. L. Week 4152 (Jan. 23, 1967); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964). Since an organization may embrace both legal and illegal aims a law not restricted to those having the specific illegal intent infringes unnecessarily on protected freedoms. As this Court declared in *Elfbrandt* v. *Russell,* 384 U. S. at 17, in language no less pertinent to employment in the merchant marine:

> "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees."

To deny applicants the opportunity for employment on United States merchant vessels because of Communist Party membership and activities, in the absence of evidence of either (a) specific intent to further the illegal objectives of the Communist Party, or (b) actual participation in the Party's illegal activities, raises an equally serious constitutional question. The court below held that the evidence supported the Commandant's finding that "you were well indoctrinated in and fully realized, accepted, and approved the aims and objectives of the Communist Party, including the overthrow of the present form of government in the United States by force and violence and Communist domination of the World." 369 F. 2d at 68. There is, however, no difference for constitutional purposes "... between a disqualification under an unconstitutional standard and a disqualification which, although under color of a proper standard, is alleged to violate the First Amendment." *Bond* v. *Floyd,* 385 U. S. 116, 131 (1966).

The evidence relied upon both by the court below and by the Commandant relates almost entirely to petitioner's involvement in the lawful activities of the Communist Party.

1. *Petitioner's Communist Party membership and activities.* That petitioner was a rank-and-file member of the Communist Party from 1936 until 1957, and worked as an elevator operator in the building in which the Party's offices were located from 1948 until 1960, is undisputed. There is also no question but that he engaged in various lawful and constitutionally protected activities on behalf of the Party: attended various Communist Party conventions, picketed, handed out literature, worked at rallies and signed nominating petitions.* The record is devoid of evidence, however, that petitioner was aware that the Party was engaged in any kind of criminal activity. His uncontroverted testimony that he had never heard of any espionage, sabotage or any other form of unlawful or violent activity being undertaken by the Party while he was a member (R. 307-08; J.A. 83a) is confirmed by the testimony of the chief Government witness that such activities were "completely separate and apart from the political structure" of the Party (R. 264; J.A. 41a).

2. *Petitioner's testimony relating to his knowledge of the Party's aims and to whether he would have participated*

* The Commandant also relied, in part, on petitioner's past affiliation with the International Workers Order and the American Labor Party and his signing in 1957 a Peoples Rights Party nominating petition (R. 232; J.A. 30a, 31a). There is, however, no evidence that petitioner was aware that any of these organizations engaged in illegal conduct or had illegal objectives—or, indeed, that any of these groups did engage in espionage, sabotage or advocacy of illegal activity.

in a revolution. Petitioner did state that he was aware that the Communist Party advocated the overthrow of the present form of Government (R. 312; J.A. 87a).* There is, however, no testimony that petitioner was himself committed to the overthrow of the Government. Petitioner refused to concede that he would, while a member, have participated in a revolution. But petitioner strongly affirmed that he would now fight against the Communists (R. 312; J.A. 88a). Moreover, his uncontradicted testimony was that had the Party given him "a job like sabotage I wouldn't have joined the party. I wouldn't do it" (R. 324; J.A. 100a).

3. *Attendance at Communist schools and summer camps.* Petitioner attended the Jefferson School for four or five weeks in the late thirties where he took a course on "the principles of Marxism and Leninism and the Negro question. . . ." (R. 309, 310; J.A. 85a). The only evidence relating to the nature of instruction at the Jefferson School is petitioner's testimony. He declared that no revolutionary tactics were taught him (R. 322; J.A. 98a); that he could not absorb Marxism or Leninism (R. 310; J.A. 86a); knew only that Marxism dealt with the "equality of man" and "was against capitalism" and that it assumed that Socialism would eventually take over and that there would be a bloodless revolution (R. 318; J.A. 94a). Even had he understood the principles of Marxism and Leninism, this would not suffice to show that he subscribed to these

* It is far from clear that petitioner understood that the overthrow was to be accomplished by violent means: he stated that he was taught at the Jefferson School that "there would be a bloodless revolution" (R. 318; J.A. 94a). Other than this single record reference to a nonviolent change of government, there is nothing in the record which indicates when petitioner acquired knowledge of the Party's advocacy of overthrow.

principles, or would be willing to engage in criminal conduct to bring about the realization of a Communist state.

Petitioner also spent brief periods at Camps Midvale and Unity (R. 317, 360; J.A. 93a, 127a). Since, however, the record is totally devoid of any evidence that the Party's illegal objectives or tactics were taught at these camps, it can hardly be inferred that petitioner's brief attendance at them made him aware of these tactics or objectives.

4. *Petitioner's failure to disclose membership on his original application.* Although petitioner disclosed membership in the International Workers Order (R. 349a-350a; J.A. 119a-121a) he failed to reveal his former membership in the Communist Party in his original application. The Commandant evidently did not consider this omission significant, for he did not mention it in his findings (see R. 231-33; J.A. 29a-34a). Since the regulations do not make the failure to declare membership in listed organizations a ground for denial of special validation, it is not apparent what significance petitioner's failure to disclose membership in the Communist Party could have except insofar as it may reflect upon his credibility. Certainly a nondisclosure is not itself evidence of a commitment to any objective—much less of a specific intent to bring about the violent overthrow of the Government.

To infer a specific intent to advance the illegal objectives of the Communist Party from evidence which relates solely to participation—no matter how substantial—in activities in support of the lawful objectives of the Party is no different from making participation in the lawful activities of the Party a ground for exclusion. There is no evidence connecting petitioner with those illegal objectives

and activities of the Communist Party which might permit an inference that he was likely to engage in espionage or sabotage. The Commandant's decision, therefore, is arbitrary and abridges petitioner's freedom of speech, assembly and association by punishing him for engaging in constitutionally protected activities.

Moreover, in basing its decision upon a finding that there was evidence that petitioner "realized, accepted, and approved" the illegal objectives of the Communist Party, the court below applied a different and lesser standard of proof than that required by decisions of this Court—evidence of a specific intent to advance the illegal objectives of the Party. The court below distinguished *Elfbrandt* v. *Russell, supra,* as involving "interpretation of criminal statutes, and the specific intent necessary for a constitutionally based conviction." 369 F. 2d at 68. It contrasted what it viewed as the issue in the present case: "... the reasonableness of regulation of employment in a peculiarly sensitive area of those who are knowing members and the nature of whose membership make it likely that their presence would be inimical to the United States." *Id.* at 68-69.

The court below treated *Elfbrandt* v. *Russell* as turning upon the fact that knowing members of the Communist Party who took the Arizona oath were subject to criminal prosecution for perjury as well as discharge. This distinction became untenable with this Court's recent decision in *Keyishian* v. *Board of Regents, supra,* which had nothing to do with criminal prosecutions.

II

This case also presents the serious question of whether the regulations upon which the merchant seaman screening program is based are unconstitutionally vague. Questions of vagueness assume particular importance in the context of a program which, like the one here, subjects individuals to exclusion from a field of employment because of their beliefs and associations. See, *e.g.*, *Keyishian* v. *Board of Regents*, —— U. S. ——, 35 U. S. L. Week 4152 (Jan. 23, 1967); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

The basic regulation upon which the Commandant's decision rests requires the Commandant to determine whether he is satisfied that the applicant's presence on shipboard would not be "inimical" to the security of the United States. 33 C. F. R. § 6.10-1. "Inimical" left undefined is no more precise than the terms "seditious" and "treasonable" which this Court only recently characterized as "dangerously uncertain." *Keyishian* v. *Board of Regents, supra*, 35 U. S. L. Week at 4154.

As used in these regulations "inimical" is defined further only by 33 C. F. R. § 121.03 which requires that the Commandant's decision be based on five kinds of information—only the last of which is involved in this case:

> "(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended."

This "definition" compounds rather than removes the ambiguity of the basic standard. It does not provide that

membership in a listed organization is sufficient to exclude the member from employment. Nor does it contain any hint of criteria to be employed in determining when an applicant's relation to a listed organization demonstrates that his employment would be inimical to the security of the United States. It is impossible to tell from this regulation whether only knowing members of listed organizations are barred from employment.

This, however, is but one of many questions which the vague regulations leave unanswered. For instance, does one who is aware that the Communist Party advocates the overthrow of the government, but who disagrees with this objective, come within the ban of the regulation? Does the regulation exclude from employment all knowing members, including those whose only connection with the Party is the payment of dues, or does it reach only active members? If only active membership is covered, what nature of activities permits denial of special validation? Must there be a showing that the applicant is linked with the Party's illegal activities? Or is it sufficient that he engages in such lawful political activities as passing out Party literature supporting legislation to end racial discrimination?

The court below held that the vagueness of these regulations was removed by the Commandant's construction of the regulation as requiring knowing membership. Here as in *Aptheker* v. *Secretary of State*, 378 U. S. 500, 511 n. 9 (1964), there is nothing in the language or history of the regulation to support such a construction. Even assuming a basis for so construing the regulation, however, the many other ambiguities set out above remain.

The regulation suffers from still another ambiguity. The Commandant is directed to consider not only membership

in but also "sympathetic association" with listed organizations. The Commandant based his decision in part on a finding that between 1957 and 1960 petitioner was "a member of, or knowingly and sympathetically associated and affiliated with" the Communist Party (R. 232, J.A. 31a). Even if construed as affecting only those in knowing sympathetic association with the Communist Party this phrase is so lacking in precision as to permit exclusion from employment as a merchant seaman for an undefined variety of "guiltless knowing behavior." *Cramp* v. *Board of Public Instruction,* 368 U. S. 278, 286-287 (1961). A person could be said to associate himself with the Communist Party in a "sympathetic" manner if, with knowledge of the illegal purposes of the Party, he endorses or supports Communist candidates for public office; if he defends the constitutional rights of the Communist Party or its members; indeed, if he supports any cause which is likewise supported by Communists or the Communist Party. See *Baggett* v. *Bullitt, supra; Cramp* v. *Board of Public Instruction, supra.*

III

Another serious and unresolved question is whether Congress has authorized the creation of the merchant seaman screening program. The importance of this question is emphasized both by the sweep of this program and by its impact upon the exercise of First Amendment rights.

Neither the purported statutory authority for the program, the Magnuson Act,* nor its legislative history** con-

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* 64 Stat. 427 (1950), 50 U. S. C. § 191 (1964).

** S. Rep. No. 2118, 81st Cong., 2d Sess. (1950); H. R. Rep. No. 2740, 81st Cong., 2d Sess. (1950); 96 Cong. Rec. 10794-98, 11220-21, 11321-22 (1950).

tain any reference to a personnel screening program. Rather the Act gives the President blanket authority to issue rules and regulations to safeguard vessels, harbors, ports and waterfront facilities against destruction by subversive acts. Language no less broad might well suffice to authorize an administrative program regulating a phase of the economy. But only the clearest Congressional authorization may support a program which like that here restrains an individual's liberty and brands him a "security risk" on the basis of his beliefs and associations. See *Kent* v. *Dulles,* 357 U. S. 116 (1958); cf. *Cole* v. *Young,* 351 U. S. 536, 546-47 (1956).

Even if Congress had authorized the creation of a personnel screening program, a serious question would remain whether Congress intended to authorize a program which departs so substantially from traditional norms of fair procedure:

(1) There is no appeal from a decision of an examiner or hearing board to the Commandant, or from the Commandant to some higher authority. To the contrary, although the regulations prescribe four separate decisions of the same issue, all four decisions are to be made by the same person: the Commandant. Compare *Cole* v. *Young, supra.*

(2) Although the Commandant's decision at each stage is made with the benefit of recommendations and an analysis of the evidence, as the regulations are administered the applicant has no opportunity to know what these recommendations are. That the recommendations are only advisory does not detract from an applicant's need to know the arguments he must counter and to have an opportunity

to rebut them. See *Gonzales* v. *United States,* 348 U. S. 407, 415 (1955).

(3) Even had petitioner been aware of the recommendations, he would have had no opportunity to rebut them. Despite the fact that the Commandant is the only person empowered to grant the application, the regulations afford no opportunity to submit arguments, written or oral, directly to the Commandant.

It is well settled in security clearance cases that in the absence of clear Congressional authorization it will not be inferred that Congress intended to authorize a Government agency to dispense with traditional forms of fair procedure. *Cole* v. *Young,* 351 U. S. 536 (1956); *cf. Greene* v. *McElroy,* 360 U. S. 474 (1959).

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

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February 1967

APPENDIX A

Decision of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

64 Civ. 1510

JOSEPH CLINTON MCBRIDE,

Plaintiff,

—against—

E. J. ROLAND, Commandant,
United States Coast Guard,

Defendant.

Appearances:

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RYAN, *J.*:

Plaintiff moves for summary judgment on the pleadings and the administrative record; defendant concedes that

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there is no question of fact and in turn seeks summary judgment in its favor (although it has not so moved).

Plaintiff is a merchant seaman who was denied by the Commandant of the Coast Guard special validation endorsement of his Mariner's document and thus foreclosed from shipping on vessels of 100 gross tons and over.

The action of the Commandant was taken under the Magnuson Act of August 9, 1950, 64 Stat. 427, 50 U. S. C. § 191, Executive Order No. 10173, October 18, 1950 (15 F. R. 7005, 1950 U. S. Code Cong. Service, p. 1661), and the regulations issued by the Coast Guard pursuant thereto (33 C. F. R. Parts 6, 121).

This suit is filed under the first, fifth and sixth Amendments and the Magnuson Act (28 U. S. C. A. 2, 2201, 1331). The complaint is not concise or clear; and is overburdened with lengthy recitals of what appears in the administrative record, disputes the evidence and protests plaintiff's loyalty and patriotism. Getting down to specific allegations, it does allege that the acts of the Commandant of the Coast Guard are illegal, arbitrary and void because (a) the executive orders and regulations on which they are

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based are unconstitutional, illegal and void in that they deprive plaintiff of liberty and property without due process of law, that they are vague and uncertain, that they punish membership in undefined organizations, and deny plaintiff his rights of freedom of speech, press and assembly, and his right to an impartial hearing, (b) there

is no evidence to support the Commandant's conclusion and it therefore arbitrarily punishes plaintiff, and (c) the practice contained in the executive orders and regulations is not authorized by statute. Plaintiff's damages are alleged to be in excess of $50,000., and claimed to be irreparable. The relief sought is a declaration that the defendant's acts are unconstitutional and an injunction against defendant's carrying out his decision and interfering with plaintiff's employment; affirmatively plaintiff asks that the Commandant be directed to approve his application for a validation endorsement.

All the evidence is contained in the administrative record which has been submitted to the Court. The record discloses the following undisputed facts:

On July 19, 1959 plaintiff seaman applied to the Commandant for validation of his mariner's document. With

the application plaintiff returned a printed questionnaire furnished him by the Coast Guard which called for disclosures of past and present membership in several organizations including the Communist Party. The questionnaire as filled in by plaintiff revealed membership in the IWO but not in the Communist Party.

By letter of October 15, 1959 the Commandant informed plaintiff that additional information was required in order to determine his eligibility for a specially validated document, and requested answers to further detailed interrogatories; plaintiff returned the answers on March 30, 1960. At this point plaintiff *admitted membership in the Communist Party from 1938 through 1950,* but *denied membership for other years.* He also admitted employment at Communist Party Headquarters from 1948 to 1959; signing

a 1939 Communist Party nominating petition; participation in the 1951 and 1952 May Day Parades in New York City and in the 1942 Communist Party election campaign; registered affiliation with the American Labor Party from 1949 through 1954; signature of a nominating petition for Elizabeth Gurley Flynn in her *1957* campaign for the New York City Council; attendance in *1957* at the New York

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State Communist Party convention, the National Communist Party Convention, and other Communist Party Conventions. What plaintiff did not answer (on the ground that he did not remember or did not understand) were questions concerning attendance at a Communist Party School in 1939, employment at the Communist Party Headquarters, open expressions of adherence to or admiration of Communist Party policies, association with or employment by people he believed were Communists, or his presence at the offices of the Daily Worker in 1958.

By letter of November 23, 1960, the Commandant notified plaintiff that he was not satisfied that plaintiff's presence on board vessels of the United States would not be inimical to the security of the United States. The Commandant listed 25 reasons for his conclusion, beginning with plaintiff's membership in the Communist Party up to and including 1959 and ending with his employment at Communist Party Headquarters from about 1944 through 1959 and attendance at the Daily Worker's offices as late as 1958 and including numerous designated activities of plaintiff in behalf of the Communist Party within that time. The Commandant's letter informed plaintiff of his right

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to file an answer and to request a hearing. Plaintiff filed

an answer disputing the accuracy of the statements and conclusions in the Commandant's letter and requested a hearing.

Subsequently, on November 28, 1962 and May 14, 1963, hearings were held. The Hearing Board consisted of a civilian hearing examiner in the employ of the Coast Guard, and a labor representative and a management representative selected from a panel named by the Secretary of Labor. Both plaintiff and the Government presented witnesses and exhibits and had opportunity of cross-examination. The record evidence showed:

Plaintiff was born in Florida on May 31, 1911; during his childhood he had three years formal education at a Bible school; he came to New York in 1932. After he joined the Communist Party in 1936, plaintiff was taught to read and write by a Party member. In the late 1930's, plaintiff attended the Daily Worker School (the "Jefferson School") for four or five weeks. Here, he was taught the theories of Marxism and Leninism, particularly as to "how to bring about a solution to the Negro question"; he attended lectures by lecturers in the Party, and was given Communist

publications to study.

From 1948 through August 4, 1960, plaintiff was employed as an elevator operator and night watchman at Communist Party Headquarters, a position which required membership in the Party. Although plaintiff claimed that he had left the Party in 1957, he explained the fact that the Party continued to employ him beyond 1957 at its Headquarters by stating that only his group branch knew that he had ceased being a Party member.

Although plaintiff testified that he joined the Party and remained in the Party solely because the Communists

"were supposed to help the cause of the Negro", the evidence discloses that his activities in behalf of the Party were extensive. He attended Communist Party Club meetings during the late 1940's and early 1950's; sometime subsequent to 1941 he became a member of the Waterfront Section of the Party; he attended Communist Party state and national conventions as late as 1957; he followed the Party line against United States involvement in the Korean War; and was employed by the Party for two months in 1950 in organizing a peace demonstration for May Day 1950, and participated in these demonstrations

in 1951 and 1952. In addition, plaintiff signed various nominating petitions for Communist Party members, attended Communist Party camps where lectures were regularly given in Communist doctrine, and did general political work; picketed, passed out leaflets, sold the Daily Worker and worked at rallies.

Plaintiff testified that he left the Communist Party in 1957 because "the Communist Party was not alert and on the ball on the Negro question," in spite of the fact that he testified that he had first become dissatisfied with it for this reason during World War II, and again in 1951. He also testified that when he did leave, he did not change his ideas about the Party, but only left because it was not interested in the "Negro question".

While a Party member, plaintiff learned that the Communist Party advocated the overthrow of the present form of government in this country, and while he was not sure that he would have participated in such a revolution, he testified that if the Communists did start a revolution he would "go on the side of the Americans" and "fight against the Communists."

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At the hearing, plaintiff presented two character witnesses. The first, Patricia Mae Buitoni, stated that she knew plaintiff well since 1947; that she attended May Day Parades frequently and had visited Communist Party Headquarters, but denied membership in the Party. The second witness, Ed Woodhead, testified to having first met plaintiff late in 1959 or early 1960 in a neighborhood bar, but his knowledge of plaintiff was apparently confined to conversations with him during occasional meetings at the bar and a few meals at plaintiff's home.

The Commandant's Decision

The Commandant having "reviewed the record of the hearing and considered the recommendations of the Hearing Board", by decision dated October 14, 1963, denied plaintiff's application for special validation endorsement of his U. S. Merchant Mariner's Document, on the ground that he was not satisfied that plaintiff's "character and habits of life are such as to authorize or warrant the belief that your presence on board a merchant vessel of the United States would not be inimical to the security of the United States." He based this conclusion on a finding that "[f]or more than twenty years, beginning in 1936 when you joined

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the Communist Party, you were knowingly and sympathetically associated and affiliated with the Communist Party as demonstrated by your active participation in the Communist Party and in Communist Party-inspired organizations and activities." The Commandant found further that plaintiff's conduct indicated that "he was well indoctrined in and fully realized, accepted, and approved the aims and ob-

jectives of the Communist Party, *including the overthrow of the present form of Government in the* United States *by force and violence and Communist domination of the World.*"

The Commandant did not credit plaintiff's testimony that he had joined the Communist Party because he thought the Communists would help the cause of the Negro, nor that he had left the party in 1957. He found that plaintiff's testimony in these respects was negated by his continued association with and participation in the Communist Party and its activities long after his alleged disillusionment with the Party and by plaintiff's employment at Communist Party National, State and County headquarters up to 1960, which employment would not have been available to a non-Party

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member. Plaintiff's explanation that he kept his job because headquarters did not know that he had left the party was not believed by the Commandant.

The Commandant's decision notified plaintiff that he had the right to appeal his decision within twenty days. Plaintiff did appeal, but waived the right to appear personally or by counsel before the Appeal Board, electing to rely on the record below. The Appeal Board recommended affirmance of the Commandant's decision, and the Commandant, on March 3, 1964, adhered to his decision.

It is upon this record that we proceed.

The Magnuson Act, in pertinent part authorizes the President whenever he finds the security of the United States threatened by subversive activity to issue rules and regulations to safeguard its vessels, harbors and waterfront facilities against destruction, sabotage and subversive activities. On October 18, 1950, the President issued Executive Order No. 10713 (15 F. R. 7005) providing that the

"Commandant may require that all licensed officers and certificated men who are employed on other than exempted designated categories of merchant vessels of the United States be holders of specially validated docu-

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ments. The form of such documents, the conditions, and the manner of their issuance shall be prescribed by the Commandant. The Commandant shall revoke and require the surrender of a specially validated document when he is no longer satisfied that the holder is entitled thereto."

Pursuant to the direction of this Executive Order, the regulations of the Coast Guard were published in Title 33 of the Code of Federal Regulations, Part 121, instituting a screening program, entitled "Special Validation Endorsement for Emergency Service for Merchant Marine Personnel."

These regulations require all merchant seamen employed on vessels of the United States of a hundred gross tons or over to obtain special validation endorsement of their merchant mariner's documents (33 C. F. R. §121.01(a)). The Commandant is empowered to issue such validation endorsement upon a finding that "the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States" (33 C. F. R. §121.07). Information which "may" preclude a favorable determination includes, *inter alia*, "[m]embership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement,

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group, or combination of persons designated by the At-

torney General pursuant to Executive Order 10450, as amended" (33 C. F. R. 121.01(e)). To obtain fuller information, the Commandant may require the applicant to answer written interrogatories. See 33 C. F. R. 121.05(d).

If there is any question as to an applicant's eligibility for security clearance, the Commandant is to refer the matter to a Committee composed of representatives of the Legal Division, the Merchant Vessel Personnel Division, and the Intelligence Division of the Coast Guard (33 C. F. R. §121.05(e)). This Committee then prepares an analysis of the available information and makes a recommendation to the Commandant. If the Commandant then "is not satisfied" that the applicant is eligible for security clearance, he sends written notification to the applicant, who may then request a hearing (33 C. F. R. §121.07(b)). The hearing is conducted by a Board of three members, two of whom are civilian Labor and Management Representatives, and the applicant and the Government have the right to present whatever evidence they wish and to cross-examine fully. See 33 C. F. R. 121.19. The Hearing Board then makes a recommendation to the Commandant who has the final power of decision (33 C. F. R. §121.21). If the Comman-

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dant's decision is adverse to the applicant, he may appeal to an Appeal Board composed of three members, two of whom are Labor and Management representatives (33 C. F. R. §121.23). The applicant has the right to an entirely new hearing upon such evidence as he wishes to present before the Appeal Board (33 C. F. R. §121.23). The Appeal Board then makes a recommendation to the Commandant who has the final power of decision (33 C. F. R. §121.25). The procedures here outlined were followed.

Plaintiff challenges both the *sufficiency of the evidence to support the Commandant's decision and the procedures employed,* urging that they deprived him of substantive as well as precedural due process.

Although we are called upon to review an administrative determination and the evidence supporting it, our jurisdiction is not under the Administrative Procedure Act (5 U. S. C. A. 1009). It is undisputed that for two reasons at least the Administrative Procedure Act does not apply to the Commandant's determinations, first because the subject matter of the Act comes within the exception of Sections 1003 and 1004, as it concerns naval or military affairs; second, the Act does not require an adjudication to be de-

termined on the record after opportunity for agency hearing under Section 1004 (*Parker* v. *Lester,* 112 F. Supp. 433, 227 F. 2d 708; 62 *Yale Law Journal* 1163; cf. *Warren* v. *Artz,* 18 F. R. D. 11). The fact that plaintiff has exhausted his administrative remedies is in order to fulfill the requirements of Section 2201, 28 U. S. C. A. rather than those of the Administrative Procedure Act.

Our obligation in this suit is to examine the record to see that in reaching the decision which has been reached, the Federal constitutional guarantees of the plaintiff were fully observed.

Plaintiff challenges the procedures employed in four respects. First, plaintiff argues that Section 121.19(K) of the Coast Guard Regulations is unconstitutional in that it authorizes the Board to reach a conclusion on the basis of secret information as well as information presented at the hearing, and that the Commandant did use just such information in reaching his decision, thus depriving plaintiff

of the right of confrontation and of cross-examination. The argument—unsupported by the record and by logic—is that since the evidence at the hearing in plaintiff's opinion was not sufficient to support the Commandant's conclusion he

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must have relied on secret information to reach the decision he did. The Commandant's decision recites that it is "on the basis of the evidence adduced of record"; and his findings relate to that evidence, undisputed as it is on the whole. There is nothing to sustain an inference that any information not in the record was even known to the Commandant. Plaintiff has pointed to no finding which expressly or inferentially can be said to relate to any evidence not of record. The Hearing and the Appeals Boards —the recommendations of both of which the Commandant accepted—based their recommendations on the record, specifically referring to the evidence therein disclosed. The Appeal Board had before it the Commandant's statement of reasons for the original rejection, transcript of hearing and documentary evidence introduced and the Hearing Board's statement in support of its recommendation—in short the entire record up to that time. The recommendation of the Appeal Board recites that it is based entirely on the record of the hearing. It was on this record that plaintiff took his appeal and on which he now invokes the summary jurisdiction of this Court; he may not go outside of it, nor ask us to do so.

Plaintiff then contends that Sections 121.19(m) and

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121.25 of the Regulations, which direct the Hearing and Appeals Boards to forward their recommendations to the Commandant violate due process because they do not authorize that the applicant be furnished with a copy, and in

fact he was not given a copy. There is no prohibition against furnishing such a copy; plaintiff never requested one, nor did he object to the failure to furnish him with one, although he had full opportunity to do so. Not only did he know of this procedure from the Regulations, but from the Hearing Board when it gave him an opportunity to submit a memorandum and advised him that it would submit a recommendation to the Commandant.

The argument advanced by plaintiff that it was essential that he be informed of the decision of the Board in order to know in what respect his evidence was deficient, whether secret evidence was considered and whether he should file an appeal, is answered by the fact that he does not urge any support for the claim that secret information was considered or that he had additional evidence affecting the charge against him he could or would have submitted, and that he did in fact take an appeal. The facts which underlay the recommendations were disclosed by the evidence at the hearing, and plaintiff had a copy of the hearing

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minutes. The Commandant's decision was based on the record and on the recommendations which were based on the evidence in this record. There was no reversal of the Commandant's position following receipt of the recommendations. The reasons he had set forth in support of his initial denial conveyed to plaintiff in writing were the same as those which supported his adherence to his initial decision after having received the recommendations. Plaintiff was therefore fully informed at all times of the charges he had to meet and the basis for the conclusion that he was not eligible for a validation endorsement. Moreover, the recommendations have now been furnished to him as part

of the record, and he has pointed to nothing in them which would have been of help to him. The memorandum which he submitted to the Hearing Board, without having seen the recommendations, closely parallels the memorandum submitted here after having seen them. We may not presume injury to plaintiff from his failure to see the recommendations during the hearings, when now having seen them he can point to none.

Due process requires that an accused be given notice of the charges made against him. This was fully and fairly done here, first by the letter from the Commandant setting

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forth his reasons for denying plaintiff's application; then by detailed interrogatories, which plaintiff could answer; then by the hearing at which plaintiff produced his own witnesses and confronted the accusing witnesses, and finally by the Commandant's decision detailing his findings. Plaintiff waived his right to a hearing on the appeal and for the opportunity to present further evidence and argument.

Plaintiff's third contention is directed to Sections 121.13 and 121.23 which provide for the establishment by the Commandant of a Hearing and an Appeal Board. It is difficult to understand plaintiff's point here that he was denied due process because this authority vested in the Commandant made him both prosecutor and judge.

There is no evidence that the Commandant himself did any prosecuting. The initial investigation under Section 121.05(e) is made by Coast Guard personnel, who make a recommendation to the Commandant; up to this stage of the procedures the matter is solely within the Coast Guard. We view this as a normal and expected procedure for the

agency faced with the necessity of making a decision as to

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an applicant's fitness to conduct its own investigation. From then on however, if the Commandant is not satisfied as to the applicant's fitness, the Coast Guard personnel, including the Commandant, have a different and minor role. The Board which hears the evidence (and its convocation is mandatory and not discretionary with the Commandant) under Section 121.13, is made up of two men wholly unrelated to the Commandant or the Coast Guard, whose names are not even placed on a list by the Commandant, and a third person who, while employed by the Coast Guard, is an independently functioning civilian examiner. The names and the connections of the members of the panel are submitted ahead of time to plaintiff, who may challenge all or any for cause and peremptorily (Section 121.17) in which case alternate names are submitted to plaintiff. The Appeal Board is similarly constituted. The Commandant does not sit on either Board and he is not present at the hearing, or at the consideration of the appeal.

The fact that the recommendations of the two Boards coincided with the Commandant's initial determination that plaintiff was not eligible does not compel or lead to a con-

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clusion that they were the Commandant's alter egos. The presence of the Civilian Examiner, is not a denial of due process. That the strict separation of functions imposed in judicial hearings is not required of administrative hearings is conceded by plaintiff. Plaintiff's attack is simply the general statement, with nothing to substantiate it, that since the Commandant's decision was not favorable to him it must have been based on bias.

Finally, plaintiff attacks the Regulations in their entirety on the ground that the Act does not expressly authorize a screening program and "no less one that is constitutionally defective."

The Regulations are not constitutionally defective, but even if they were this would not mean that they were promulgated without warrant in law. *Parker* v. *Lester*, 227 F. 2d 708, *United States* v. *Gray*, 207 F. 2d 237. The Act expressly authorizes the President to institute such measures and issue such rules and regulations to carry out the purpose of the Act—which he did by Executive Order empowering the Commandant to take all necessary steps to insure the security of merchant vessels. It was pursuant to this order that the regulations were published, but even

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if they had not been expressly authorized, they would not be illegal so long as they were consonant with and necessary to carry out the provisions of the Act.

We conclude that the procedures employed in reaching the administrative decision afforded plaintiff all constitutional safeguards.

We now consider plaintiff's challenge to the final determination herein in its substantive aspect: (1) that there was no "lawful evidence" before the Commandant to sustain his finding under the Regulations that plaintiff's presence aboard ship would be "inimical to the National Security", (2) that the Coast Guard Regulations are unconstitutional on their face and as applied because they punish "guiltless knowing behaviour", and (3) that the Coast Guard Regulations are unconstitutionally vague.

In the face of the undisputed finding of plaintiff's membership in the Communist Party, his first argument is that

the evidence has failed to show that degree of knowledge and activity sufficient to constitute his membership "active and knowing" in the sense that the individual knew of and participated in the Party's illegal activities (*Scales* v.

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United States, 367 U. S. 203 and *Noto* v. *United States*, 367 U. S. 290). From this he argues that the Commandant deprived him of his right to work on the basis of mere membership and that the regulation under which the Commandant was authorized to do this is unconstitutional.

It is absolutely clear from a reading of the Commandant's decision that he found much more than "mere membership which terminated 8 years ago" (as plaintiff states it). Our only question is whether the evidence substantiates the finding; we hold that it does. We have already reviewed the evidence in the record and taken as a whole we cannot say that it was unreasonable to find and conclude that plaintiff knew of the purposes of Party and was committed to these purposes and displayed this commitment by extended membership in the Party and continuous activities on its behalf (*Aptheker* v. *Rusk*, 378 U. S. 500).

Against the background of his admitted membership in the Party for a period of at least 20 years and probably 24, we have at the outset plaintiff's testimony that, while a Party member he knew that the Party advocated overthrow of the present form of government of the United

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States, and that it advocated and taught that "Russia would become the Communist Party State; that Capitalism is a dying society."

There followed then the fact that as an illiterate poor Negro from the South he received his only formal educa-

tion at the hands of the Party for a period of two years—through personal teaching by Party members and attendance at Jefferson School, the training school for the Party—and was indoctrinated into Party purpose and policy; his employment at the National, State and County Headquarters for 11 years an an elevator operator—a position which required membership in the Party—and one which though humble would bring him into personal contact with the Party functionaries; his regular attendance at the meetings of his branch as well as at the National Conventions; his membership in the Waterfront Section of the Party; his open loyalty to the Party position in our involvement in the Korean war, to which the Party was opposed; and his employment by the Party to organize peace demonstrations. There is also his political activity on behalf of the Party notably his signature on nominating petitions for election to political office of convicted Communist leaders. There is the evidence of his concealment of membership in the Communist Party in the sworn questionnaire

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sent him by the Coast Guard in connection with his application for the validation of his documents, but the disclosure of his membership in the IWO; this was followed by his concealment and falsification of the length of time he was a member in the Party (—in the sworn statement to the interrogatories—giving the dates of 1938 through 1950, and his third sworn statement at the hearing that he was such a member from 1936 to 1957). Even this last testimony that he had left the Party in 1957 was contradicted by the fact that he remained employed at Headquarters until 1960 (which employment required membership in the Party). It was further contradicted by the reason he ad-

vanced for leaving it in 1957—that the Party was not interested in the Negro cause—it having been plaintiff's testimony that he had first become disenchanted with the Party in this respect as early as World War II, and then again in 1951, but had done nothing about his disenchantment until 1957. Moreover, there was absolutely no evidence that as a Negro—who had allegedly joined and been very active in the Party solely to help the Negro cause—he had done anything in the field of Negro rights through other organizations. The testimony of his two witnesses cast not a shadow of doubt on this aspect of the evidence,

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in fact his witness Woodhead thought plaintiff had left as early as the 1940s. Even the reason for plaintiff's claimed disillusionment with the Party and his breach with it was not that he disavowed its purposes, with which he had testified he was acquainted, but that it did not help the Negro. There was no evidence that he had ever expressed dissatisfaction or disagreement with the Party's illegal purposes—even after his alleged breach.

The Commandant's conclusion that plaintiff had not left the Party in 1957 and that he continued to be "a member of or knowingly and sympathetically associated and affiliated with the C. P." was fully warranted on the evidence.

Plaintiff's further argument, is that all the activity shown to have been engaged in by him was lawful and constitutionally protected—encompassing as it did freedom of assembly, of speech, of press and to vote—and that it could not lawfully be used to deprive plaintiff of his further protected right to work. Plaintiff contends also that it is not alone the quantity of activity which denotes active membership, but also its quality—which must be that of someone

"high in the councils of the Party"—(*Scales* v. *United*
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States, supra 254)—which plaintiff a mere rank and filer was not, and that since there was no link between plaintiff and the Party's illegal activities his was "a guiltless membership" which may not be "arbitrarily" punished.

There was no evidence that plaintiff was directed to, or did engage in illegal activity on behalf of the Party—just as there was no evidence that he was directed to and refused to obey. There was evidence that he was directed to and did perform a variety of activities, from organizing peace demonstrations to setting up tables—more in keeping with his position as a rank and file member, than as a leader.

It is obvious that as a rank and file member aboard a vessel he would be just as capable as a functionary, if directed to, of endangering the security of the vessel, or the harbor through sabotage, delays or obstructions—all of which might be accomplished through peaceful means. That he never did, is no answer. If he took directions and acted on Party orders to organize a peace rally when this country was at war against Communism in Korea and did not do so as his own free act and decision the Commandant could
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reasonably find that he might just as easily follow Party directions and orders to hinder or obstruct the sailing of a vessel with emergency materials, in some other war.

Besides there is a tremendous and substantial difference between the activity required to be proved for a Smith Act conviction, under *Noto* and *Scales*, and the degree of activity within the Communist Party which might constitute reasonable grounds for barring a seaman from a vessel as a security risk. The one is directed to teaching and ad-

vocating and inciting to violence; the other need be simply a loyalty and willingness to carry out orders of an organization which might endanger the security of this country's vessels and harbors whether by violent or peaceful means. To say that plaintiff's right to work on a ship may not be interfered with until it has been shown that he has engaged in some prior illegal activity on behalf of the organization is to say that a security program may not employ reasonable preventive measures but must wait until the harm sought to be protected against has been done. The purpose of the screening program was to secure vessels, shipments and waterfront facilities from potential as well as actual

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danger and any regulation reasonably related to this purpose is lawful (*Shaughnessy* v. *United States,* 345 U. S. 206).

We conclude that the denial of security clearance as a merchant seaman to one who held meaningful membership for over 20 years in the Communist Party was a valid application of the Coast Guard regulations, since it might reasonably be assumed that such a person might "engage in activities inimical to the security of the United States" (*Communist Party* v. *Control Board,* 367 U. S. 1 (1961)).

Plaintiff's next contention is that the Sec. 121.03(e) of the Regulations is unconstitutional as applied to him and on its face because it permits "bare" membership in the Communist Party to bar him from his calling and because its terms are vague. The Section reads,

> "[m]embership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended . . ."

His point that as applied to him the section is unconstitutional is disposed of by our finding that the Commandant in making his decision barring plaintiff under the Regula-

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tion properly construed the Regulation as requiring knowing membership. The Commandant's decision on the evidence found that plaintiff was "a member of the Communist Party" (No. 1) and "knowingly and sympathetically associated and affiliated with the Communist Party" (No. 2); and was "well indoctrinated in and fully realized, accepted and approved the aims and objectives of the Communist Party including the overthrow of the present form of Government in the United States by force and violence and Communist domination of the World." It was this evidence of membership in the Party and continued affiliation and association as provided in the Regulation which manifestly led the Commandant to conclude that plaintiff's presence would be inimical to the security of the United States.

The Commandant's interpretation of the Regulation was perfectly consonant with its language. There is nothing in the words "membership, affiliation or sympathetic association" which precludes an interpretation that it must be knowing or active. We have been pointed to no other construction placed on this language by the Commandant on other occasions or by other courts, and to no internal directives or opinions of counsel which would require a construction of mere membership, affiliation or association without

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more. There is absolutely no warrant for this Court's so limiting the language. The Regulation here is completely different from that which the Court struck down in *Aptheker* v. *Rusk*, *supra*. For the same reasons we hold that

it is not unconstitutionally vague. Knowing membership, knowing affiliation or knowing sympathetic association as applied here are inconsistent with innocent or indifferent affiliation or association. *Baggett* v. *Bullett,* 377 U. S. 360; *Cramp* v. *Bd. of Public Instruction of Orange County,* 368 U. S. 278. We find it unnecessary to anticipate a situation which may never arise and which is certainly not before us. The regulation is valid because it is open to such a construction without doing it violence in any way.

Plaintiff also attacks the Regulation on the ground that it permits reliance on the Attorney General's list, and the use of such evidence by the Commandant citing *Joint Antifascist Committee* v. *McGrath,* 341 U. S. 123.

First things first. *McGrath* was decided under an Executive Order which following that decision was superseded by the present order, (to cure the defect that it provided for no hearing before listing) but the authority of the At-

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torney General to maintain such a list was unquestioned. Secondly, even under *McGrath* only the organization listed could directly attack the listing (*Lawyers Guild* v. *Brownell,* 225 F. 2d 552).

The real answer to this afterthought is given by plaintiff himself when he points out that the difference between the use of the list in *McGrath* and here, is that in the former the list was used to establish a presumption while here it is used only as an element of evidence from which an inference ultimately may be drawn. Thus, the Commandant considered plaintiff's attendance at the Jefferson School and two Communist Camps, as well as his participation in the May Day Parade and his membership in the IWO—all on the Attorney General's list—to establish along with other evi-

dence plaintiff's knowing and active membership in the Communist Party—which was the basis for the conclusion reached. The Commandant did not use plaintiff's membership or activities in these other organizations as conclusive or presumptive evidence that plaintiff would endanger the security of shipping. The use made even if plaintiff could collaterally attack it, was not illegal.

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Nor does the Regulation create any presumption of disqualification from this list, but rather says that such information may be considered, which is what the Commandant did.

We conclude that the Commandant's decision on the basis of the record that he was not satisfied that plaintiff's presence on board vessels of the United States would not be inimical to the national security was fully consonant with the Constitution—as were the procedures employed in reaching the decision. The Commandant reasonably and properly concluded that plaintiff, long subject to Party discipline, could not be permitted with national safety to work on board United States Merchant Vessels.

Plaintiff's motion for summary judgment is denied and judgment is entered for defendant dismissing the complaint; the Clerk is directed to enter judgment accordingly forthwith.

So Ordered.

Dated: December 15, 1965.

Sylvester J. Ryan
U. S. D. J.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 54—September Term, 1966.

(Argued October 5, 1966 Decided November 23, 1966.)

Docket No. 30331

JOSEPH CLINTON MCBRIDE,

Plaintiff-Appellant,

—v.—

E. J. ROLAND, Commandant, United States Coast Guard,

Defendant-Appellee.

Before:

SMITH, HAYS and FEINBERG,

Circuit Judges.

Appeal from order and judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge,* 248 F. Supp. 459, denying plaintiff's motion for summary judgment and dismissing complaint seeking to require appellee, Commandant of United States Coast Guard, to validate specially his Mariner's documents.

Affirmed.

BENJAMIN S. DUVAL, JR., New York, N. Y. (Melvin L. Wulf, New York, N. Y., on the brief), *for plaintiff-appellant.*

ROBERT E. KUSHNER, Asst. United States Attorney for the Southern District of New York (Robert M. Morgenthau, U. S. Attorney and David E. Montgomery, Asst. U. S. Attorney, on the brief), *for defendant-appellee.*

SMITH, *Circuit Judge*:

Plaintiff-appellant, desiring to seek maritime employment, applied to appellee for special validation of his mariner's papers.[1] Appellee initially, after receiving plain-

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[1] 50 U. S. C. §191

. . . Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations—

* * * * *

(b) to safeguard against destruction, loss or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States.

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33 C. F. R. §121.01

§121.01 *Requirements for special validation endorsement.*

(a) Except as otherwise provided in this section no person shall be employed on a merchant vessel of the United States of 100 gross tons or over unless he is in possession of a Merchant Mariner's document bearing a special validation endorsement for emergency service.

* * * * *

(c) By 'employed' and 'employment' is meant the engagement of any person to fill any licensed or certificated berth on board ship

tiff's answers to interrogatories and reference to a Committee, and thereafter, after hearing and recommendation by a Hearing Board and after further hearing and recommendation by an Appeal Board, denied plaintiff's application for special validation endorsement of his U. S. Merchant Mariner's Document, on the ground that appellee was not satisfied that plaintiff's "character and habits of life are such as to authorize or warrant the belief that your presence on board a merchant vessel of the United States would not be inimical to the security of the United States." Plaintiff, having exhausted administrative procedures, sued in the United States District Court for the Southern District of New York, seeking a declaratory judgment that the Commandant's acts were unconstitutional, an injunction against carrying out his decision and interfering with plaintiff's employment, and a court order to the Commandant that the application for validation endorsement be approved. The Court, Sylvester J. Ryan, *Judge,* found the

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whether or not under articles and includes those engaged for standby, relief, or other capacities.

Title 33, C. F. R., Part 6—*Protection and Security of Vessels, Harbors, and Waterfront Facilities*

* * * * *

Subpart 6.10—*Identification and Exclusion of Persons From Vessels and Waterfront Facilities* [originally issued as Executive Order 10173, 15 F. R. 7005 (1950)]

§6.10-1 *Issuance of documents and employment of persons aboard vessels.*

No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States: *Provided,* That the Commandant may designate categories of merchant vessels to which the foregoing shall not apply.

evidence and procedures sufficient, denied plaintiff's motion for summary judgment, and dismissed the action. 248 F. Supp. 459. From this order, plaintiff appealed. We find no error, and affirm the order of the District Court.

July 19, 1959 appellant, who had been a merchant seaman prior to 1948, filed with his application for a specially validated merchant mariner's document, a questionnaire which called for answers as to membership in certain organizations, including the Communist Party. He disclosed that he had been a member of the International Workers Order. On request for further information he admitted membership in the Communist Party from 1938 through 1950 only. He admitted employment at Communist Party Headquarters in New York from 1948 to 1959, signing a 1939 Communist Party nominating petition, participation in 1951 and 1952 May Day parades, participation in the 1942 Communist Party election campaign, registered affiliation with the American Labor Party 1949-54, signature of a nominating petition for Elizabeth Gurley Flynn for New York City Council in 1957, attendance in 1957 at the New York State Communist Party convention, the National Communist Party convention, and other Party conventions.

The Commandant informed appellant by letter that he was not satisfied appellant's presence on board vessels of the United States would not be inimical to the security of the United States, giving his reasons and notifying appellant of his right to a hearing, which was requested and held pursuant to 33 C. F. R. §121.13, both sides presenting witnesses and exhibits. There was evidence of employment at Communist Party Headquarters in New York as elevator operator and night watchman from 1948 to 1960, and employment for two months in 1950 in organizing a peace

demonstration for May Day 1950 against United States involvement in the Korean War. Appellant admitted that he learned that the Party advocated the overthrow of the present form of government, and that he was uncertain whether he would have joined in revolution.

Appellant's application was denied October 14, 1963. Appeal was taken to the Appeal Board, relying on the record. The Board recommended affirmance and the Commandant on March 3, 1964 adhered to his decision. Complaint was filed in the United States District Court for the Southern District of New York May 15, 1964, dismissed on motion December 17, 1965, and appeal taken January 20, 1966.

Appellant contends that the Commandant's decision deprives him of liberty and property without due process of law, because evidence is lacking that appellant is likely to engage in espionage or sabotage, and absent such evidence deprivation of freedom of association or the right to hold private employment denies him due process of law guaranteed by the Fifth Amendment.

The rights he claims, to freedom of association and freedom to follow a chosen profession free from unreasonable governmental interference, are constitutionally protected. *Aptheker* v. *Secretary of State,* 378 U. S. 500, 507 (1964); *Greene* v. *McElroy,* 360 U. S. 474 (1959). To succeed, however, he must show not only that the right is one entitled to protection, but that his deprivation of it was without due process, i.e., arbitrarily or without sufficient evidence, or that the governmental interference is unreasonable. Procedurally, there is no lack of due process in the statutory scheme, with opportunity to present evidence and cross examine adverse witnesses before the Boards, determination by the Commandant at each stage, and judicial review

of the final determination. Nor were the findings and determination made without sufficient evidence. Here there was evidence, not only of "mere" membership in the Communist Party, but of long time (24 year) membership in and employment by the party, knowledge of the party's aims at overthrow of the government, false statements as to his membership on his original application, his admission that "it's hard to say" if he would have participated in a revolution while he was admittedly a member, proof that he not only performed the regularly assigned membership tasks of picketing, distributing literature, taking part in rallies, parades and demonstrations, but attended communist schools and summer camps and state and national conventions, and during the Korean War was a paid organizer of peace demonstrations. The evidence amply supports the Commandant's finding:

> "that 'you were well indoctrinated in and fully realized, accepted, and approved the aims and objectives of the Communist Party, including the overthrow of the present form of Government in the United States by force and violence and Communist domination of the World.'"

The screening program is not unreasonable. The merchant marine, although involving private employment, is vulnerable to sabotage and espionage, and is obviously a sensitive area of employment of vital importance to the national defense. Compare *American Communications Assn.* v. *Douds,* 339 U. S. 382 (1950).

Appellant relies heavily on *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966), *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964), *Scales* v. *United States,* 367 U. S. 203 (1961)

and *Noto* v. *United States*, 367 U. S. 290 (1961) in attacking the constitutional validity of the statute and regulations here. These cases, however, all involve interpretation of criminal statutes, and the specific intent necessary for a constitutionally based conviction. In the case before us we have at issue the reasonableness of regulation of employment in a peculiarly sensitive area of those who are knowing members and the nature of whose membership activities makes it likely that their presence would be inimical to the United States. As interpreted and applied to the facts here we find nothing unreasonable in the regulations.

Appellant's further contention that the regulation, in its use of the term "inimical," is unconstitutionally vague, is not well taken. In determining whether an applicant's presence would be not inimical, the Commandant is permitted to consider certain types of information, including membership in an organization designated by the Attorney General pursuant to Executive Order 10450 as amended. The Commandant has construed this to require "knowing" rather than "mere" membership, and such a construction in the context of "inimical" is surely not unreasonable. The term inimical itself has been used by the Court in a similar context. *Aptheker* v. *Secretary of State, supra,* at 511. The labor union oath struck down for vagueness in *Hurwitz* v. *Directors Guild of America, Inc.*, 364 F. 2d 67 (2d Cir. 1966), was far broader in language: "to believe in . . . any organization that believes in . . . overthrow . . . by any illegal or unconstitutional methods." It required not even "mere" membership.

Appellant further contends that the screening program was not intended to be authorized by the Magnuson Act. The intention is quite plain, however, not only in the Act itself, but in its legislative history. See Senate Report No.

2118, Committee on Interstate and Foreign Commerce, 81st Cong. 2d Sess. (1950), 1950 U. S. Code Cong. Service 2954,[2] Remarks of Senator Magnuson, 96 Cong. Rec. 10795.[3] *United States* v. *Gray*, 207 F. 2d 237, 241 (9th Cir. 1953); *Parker* v. *Lester*, 227 F. 2d 708, 715 (9th Cir. 1955); compare *United States* v. *Aarons*, 310 F. 2d 341 (2d Cir. 1962).

An additional claim is that the Congress did not intend to authorize reliance on "secret evidence" or on undisclosed recommendations of the Boards. The decision and reports of the Boards in this case, however, are stated to be based solely on evidence on the record, and the recommendations were furnished to appellant as part of the record in the District Court and appellant has pointed out nothing which would have been of help to him.

We find no merit in appellant's other arguments.

The judgment dismissing the action is affirmed.

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[2] In enacting the Act, Congress sought to give

"the President the power to safeguard against destruction, loss, or injury from sabotage or other subversive acts to vessels, harbors, ports and other water-front facilities. It [the legislation] will permit the United States to put in such protective measures short of the declaration of a national emergency.

"The bill authorizes the President to employ such departments, agencies, offices, or instrumentalities of the United States as he may deem necessary to carry out the purpose of this measure, to give utmost protection to shipping facilities."

[3] "This measure will give the President the authority to invoke the same kind of security measures which were invoked in World War I and in World War II."

APPENDIX C

50 U.S.C. § 191 (1964)

Regulation of anchorage and movement of vessels during national emergency

Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

Within the territory and waters of the Canal Zone the Governor of the Canal Zone, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.

Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive

activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations—

(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect such vessels at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States. Any appropriation available to any of the Executive Departments shall be available to carry out the provisions of this chapter. June 15, 1917, c. 30, Title II, § 1, 40 Stat. 220; Aug. 9, 1950, c. 656, § 1, 64 Stat. 427; Sept. 26, 1950, c. 1049, § 2(b), 64 Stat. 1038.

33 C. F. R.—NAVIGATION AND NAVIGABLE WATERS

Chapter 1—Coast Guard, Department of the Treasury

Subchapter A—General

PART 6—PROTECTION AND SECURITY OF VESSELS, HARBORS, AND WATERFRONT FACILITIES

* * * * *

Subpart 6.10—Identification and Exclusion of Persons From Vessels and Waterfront Facilities

§ 6.10-1 *Issuance of documents and employment of persons aboard vessels.*

No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States: *Provided,* That the Commandant may designate categories of merchant vessels to which the foregoing shall not apply.

§ 6.10-3 *Special validation of merchant marine documents.*

The Commandant may require that all licensed officers and certificated men who are employed on other than the

exempted designated categories of merchant vessels of the United States be holders of specially validated documents. The form of such documents, the conditions, and the manner of their issuance shall be as prescribed by the Commandant. The Commandant shall revoke and require the surrender of a specially validated document when he is no longer satisfied that the holder is entitled thereto.

* * * * *

§ 6.10-9 *Appeals.*

Persons who are refused employment or who are refused the issuance of documents or who are required to surrender such documents, under this subpart, shall have the right of appeal, and the Commandant shall appoint Boards for acting on such appeals. Each such Board shall, so far as practicable, be composed of one Coast Guard officer, one member drawn from management, and one member drawn from labor. The members drawn from management and labor shall, upon suitable security clearance, be nominated by the Secretary of Labor. Such members shall be deemed to be employees of the United States and shall be entitled to compensation under the provisions of section 15 of the act of August 2, 1946 (5 U.S.C. 55a) while performing duties incident to such employment. The Board shall consider each appeal brought before it and, in recommending final action to the Commandant, shall insure the appellant all fairness consistent with the safeguarding of the national security.

Subchapter K—Security of Vessels
[CGFR 56-12]

Part 121—Special Validation Endorsement for Emergency Service for Merchant Marine Personnel

By virtue of the authority vested in me as Commandant, United States Coast Guard, by Executive Order 10173, as amended, Part 121 is amended to read as follows:

Sec.

121.01 Requirement for special validation endorsement.
121.03 Standards.
121.05 Applications.
121.07 Approval of applicant by Commandant.
121.09 Holders of special validation endorsement.
121.11 Notice by Commandant.
121.13 Hearing Boards.
121.15 Notice by Hearing Board.
121.17 Challenges.
121.19 Hearing procedure.
121.21 Action by Commandant.
121.23 Appeals.
121.25 Action by Commandant after appeal.
121.27 Outstanding endorsements and applications.
121.29 Applications previously denied.

Authority: §§ 121.01 to 121.29 issued under Sec. 1, 40 Stat. 220, as amended; 50 U. S. C. 191; E. O. 10173, 15 F. R. 7005, 3 CFR, 1950 Supp., E. O. 10277, 16 F. R. 7537, 3 CFR, 1951 Supp., E. O. 10352, 17 F. R. 4607, 3 CFR, 1952 Supp. Interpret or apply: R. S. 4517, as amended, 4518, as

amended, secs. 19, 223 Stat. 58, 118 as amended, sec. 7, 49 Stat. 1936, as amended; 46 U. S. C. 570, 571, 572, 2, 689.

§ 121.01 *Requirements for special validation endorsement.* (a) Except as otherwise provided in this section no person shall be employed on a merchant vessel of the United States of 100 gross tons or over unless he is in possession of a Merchant Mariner's document bearing a special validation endorsement for emergency service.

(b) The vessels described in paragraph (a) of this section include those at anchor or made fast to a dock, but not those laid up or dismantled or out of commission.

(c) By "employed" and "employment" is meant the engagement of any person to fill any licensed or certificated berth on board ship whether or not under articles and includes those engaged for standby, relief, or other capacities.

(d) The following terms and conditions shall apply with respect to the employment of any person as a replacement or addition in the crew of any vessel described in paragraph (a) of this section at foreign ports when persons in possession of documents bearing a special validation endorsement for emergency service are not available as established to the satisfaction of the United States consular representative of the area:

(1) A person in possession of a United States seaman's document not bearing a special validation endorsement for emergency service may be employed only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(2) A person who is a United States citizen and who is not in possession of a United States seaman's document may be employed if no person specified in subparagraph (1) of this paragraph is available as established to the satisfaction of the United States consular representative for the area, and then only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(3) A person who is not a citizen of the United States and who is not in possession of a United States seaman's document may be employed only if no person as specified in subparagraphs (1) and (2) of this paragraph is available as established to the satisfaction of the United States consular representative for the area and then only after the following terms and conditions are met:

(i) No such person shall be employed unless he presents evidence of temporary clearance from the United States consular representative for the area;

(ii) In no case shall the number of such persons employed on any one vessel exceed ten (10) percent of the total complement of the vessel, unless it is established to the satisfaction of the United States consular representative for the area that it is necessary to exceed this percentage to avoid delay to the sailing of the vessel or that the employment of persons with special qualifications as additional crew members is necessary in the vessel's operations; and

(iii) No such person shall be employed to fill the berth of a licensed officer or registered staff officer, except that if no radio officer is available as established to the satisfaction of the United States consular representative for the

area, a person may be employed as radio operator in accordance with the provisions of Article 24, section 2, of the International Telecommunications Convention (Atlantic City, 1947), which reads as follows:

2. (1) In the case of complete unavailability of the operator in the course of a sea passage, a flight or a journey, the master or the person responsible for the station may authorize, solely as a temporary measure, an operator holding a certificate issued by the government of another country member of the Union [Footnote: The term "Union" means those countries which are parties to the International Telecommunications Convention] to perform the radio communication service.

(2) When it is necessary to employ as a temporary operator a person without a certificate or an operator not holding an adequate certificate, his performance as such must be limited solely to signals of distress, urgency and safety, messages relating thereto, messages relating directly to the safety of life, urgent messages relating to movement of the ship and essential messages relating to the navigation and safe movement of the aircraft. Persons employed in these cases are bound by the provisions of 508 regarding the secrecy of correspondence.

(3) In all cases, such temporary operators must be replaced as soon as possible by operators holding the certificate prescribed in Sec. 1 of this article.

§ 121.03 *Standards.* Information concerning an applicant for special validation endorsement for emergency service, or a holder of such endorsement, which may preclude a determination that his character and habits of life are

such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, shall relate to the following:

(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.

(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition or treason, or conspiring with, or aiding or abetting another to commit such an act.

(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States.

(d) Deliberate unauthorized disclosure of classified defense information.

(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended.

§ 121.05 *Applications.* (a) Any person legally holding a current valid license or certificate, or an applicant for such a document, may make application at any Coast Guard Marine Inspection Office for a special validation endorsement for emergency service.

(b) Each Marine Inspection Office shall forward promptly to the Commandant each application for a special validation endorsement received by it.

(c) (1) Application for special validation endorsement shall be made under oath in writing and shall include ap-

plicant's answers in full to inquiries with respect to such matters as are deemed by the Commandant to be pertinent to the standards set forth in § 121.03, and to be necessary for a determination whether the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(2) If an applicant fails or refuses to furnish the required information or fails or refuses to make full and complete answer with respect to all matters of inquiry, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes the required information and fully and completely answers all inquiries directed to him.

(d) (1) If, in the judgment of the Commandant, an application does not contain sufficient information to enable him to satisfy himself that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant may require the applicant to furnish, under oath in writing or orally, such further information as he deems pertinent to the standards set forth in § 121.03 and necessary to enable him to make such a determination.

(2) If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

(e) Upon receipt, the application and such further information as the Commandant may have required shall be

referred, except in those instances where action on an application is held in abeyance pursuant to paragraphs (c)(2) or (d)(2) of this section, to a committee composed of a representative of the Legal Division, of the Merchant Vessel Personnel Division, and of the Intelligence Division, Coast Guard Headquarters. The committee shall prepare an analysis of the available information and shall make recommendations for action by the Commandant.

§ 121.07 *Approval of applicant by Commandant.* (a) If the Commandant is satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will direct that a special validation endorsement be entered on the applicant's Merchant Mariner Document.

(b) If the Commandant is not satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will notify the applicant in writing as provided for in § 121.11.

§ 121.09 *Holders of special validation endorsement.* (a) Whenever the Commandant is not satisfied that the character and habits of life of a holder of a document bearing a special validation endorsement are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will request the holder to furnish under oath in writing such information as he deems pertinent to the standards set forth in § 121.03 and necessary for a determination on this issue.

(b) If the holder fails or refuses to furnish such information within thirty (30) days after receipt of the Commandant's request, the Commandant may issue the written notice provided for in § 121.11(a).

(c) The holder's failure or refusal to furnish such information shall preclude a determination that the holder's character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(d) Upon receipt of such information as the Commandant may have required, the procedure prescribed in § 121.05(e) shall be followed.

(e) If the Commandant is satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall notify the holder accordingly.

(f) If the Commandant is not satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall notify the holder in writing as provided for in § 121.11.

§ 121.11 *Notice by Commandant.* (a) The notice provided for in §§ 121.07 and 121.09 shall contain a statement of the reasons why the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the

security of the United States. Such notice shall be as specific and detailed as the interests of national security shall permit and shall include pertinent information such as names, dates, and places in such detail as to permit reasonable answer.

(b) The applicant or holder shall have 20 days from the date of receipt of the notice of reasons to file written answer thereto. Such answer may include statements or affidavits by third parties or such other documents or evidence as the applicant or holder deems pertinent to the matters in question.

(c) Upon receipt of such answer the procedure prescribed in § 121.05 (e) shall be followed.

(d) If the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document or, in the case of a holder, notify him accordingly.

(e) If the Commandant is not satisfied that the applicant's or holder's character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall refer the matter to a Hearing Board for hearing and recommendation in accordance with the provisions of this part.

§ 121.13 *Hearing Boards.* The Commandant may establish a Hearing Board in each Coast Guard District. The

Commandant shall designate for each Hearing Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a second member from a panel of persons representing labor named by the Secretary of Labor, and a third member from a panel of persons representing management named by the Secretary of Labor.

§ 121.15 *Notice by Hearing Board.* Whenever the Commandant refers a matter to a Hearing Board, the Chairman shall:

(a) Fix the time and place of the hearing;

(b) Inform the applicant or holder of the names of the members of the Hearing Board, their occupations, and the businesses or organizations with which they are affiliated, of his privilege of challenge, and of the time and place of the hearing.

(c) Inform the applicant or holder of his privilege to appear before the Hearing Board in person or by counsel or representative of his choice, and to present testimonial and documentary evidence in his behalf, and to cross-examine any witness appearing before the Board; and

(d) Inform the applicant or holder that if within 10 days after receipt of the notice he does not request an opportunity to appear before the Hearing Board, either in person or by counsel or representative, the Hearing Board will proceed without further notice to him.

§ 121.17 *Challenges.* Within five days after receipt of the notice described in § 121.15 the applicant or holder may request disqualification of any member of the Hearing

Board on the grounds of personal bias or other cause. The request shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. The affidavit may be supplemented by an oral presentation if desired. If after due consideration the Chairman believes a challenged member is qualified notwithstanding the challenge, he shall notify the person who made the challenge and arrange to proceed with the hearing. If the person who made the challenge takes exception to the ruling of the Chairman, the exception and data relating to the claim of disqualification shall be made a matter of record. If the Chairman finds that there is reasonable ground for disqualification he shall furnish the person who made the challenge with the name of an alternate in lieu of the challenged member and arrange to proceed with the hearing. In the event the Chairman is challenged, he shall forthwith notify the Commandant, furnishing the grounds for the claim of disqualification, and the Commandant shall act upon the challenge in accordance with the foregoing procedure. In addition to the right of challenge for cause, a person who has requested a hearing shall have two peremptory challenges, one challenge for the management member and one challenge for the labor member of the Hearing Board. Should the management member be so challenged, the person who made the challenge may elect to have the management member replaced by another management member or by a member not representing either management or labor; if the member peremptorily challenged represents labor, the person who made the challenge may elect to have the labor member replaced by another labor member or by a member not representing either management or labor.

§ 121.19 *Hearing procedure.* (a) Hearing shall be conducted in an orderly manner and in a serious, business-like atmosphere of dignity and decorum and shall be expedited as much as possible.

(b) The hearing shall be in open or closed session at the option of the applicant or holder.

(c) Testimony before the Hearing Board shall be given under oath or affirmation.

(d) The Chairman of the Hearing Board shall inform the applicant or holder of his right to:

(1) Participate in the hearing;

(2) Be represented by counsel of his choice;

(3) Present witnesses and offer other evidence in his own behalf and in refutation of the reasons set forth in the Notice of the Commandant; and

(4) Cross-examine any witnesses offered in support of such reasons.

(e) Hearings shall be opened by the reading of the Notice of the Commandant and the answer thereto. Any statement and affidavits filed by the applicant or holder may be incorporated in the record by reference.

(f) The Hearing Board may, in its discretion, invite any person to appear at the hearing and testify. However, the Board shall not be bound by the testimony of such witness by reason of having called him and shall have full right to cross-examine the witness. Every effort should be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined by the applicant or holder.

(g) The applicant or holder may introduce such evidence as may be relevant and pertinent. Rules of evidence shall not be binding on the Hearing Board, but reasonable restrictions may be imposed as to the relevancy, competency and materiality of matters considered. If the applicant or holder is, or may be, handicapped by the non-disclosure to him of confidential sources, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration.

(h) The applicant or holder or his counsel or representative shall have the right to control the sequence of witnesses called by him.

(i) The Hearing Board shall give due consideration to documentary evidence developed by investigation, including membership cards, petitions bearing the applicant's or holder's signature, books, treatises or articles written by the applicant or holder and testimony by the applicant or holder before duly constituted authority.

(j) Complete verbatim stenographic transcription shall be made of the hearing by qualified reporters and the transcript shall constitute a permanent part of the record. Upon request, the applicant or holder or his counsel or representative shall be furnished, without cost, a copy of the transcript of the hearing.

(k) The Board shall reach its conclusion and base its determination on information presented at the hearing, together with such other information as may have been developed through investigations and inquiries or made available by the applicant or holder.

(l) If the applicant or holder fails, without good cause shown to the satisfaction of the chairman, to appear per-

sonally or to be represented before the Hearing Board, the Board shall proceed with consideration of the matter.

(m) The recommendation of the Hearing Board shall be in writing and shall be signed by all members of the Board. The Board shall forward to the Commandant, with its recommendation, a memorandum of reasons in support thereof. Should any member be in disagreement with the majority a dissent should be noted setting forth the reasons therefor. The recommendation of the Board, together with the complete record of the case, shall be sent to the Commandant as expeditiously as possible.

§ 121.21 *Action by Commandant.* (a) If, upon receipt of the Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall:

(1) In the case of an applicant for special validation endorsement, notify him of the Commandant's refusal to enter such endorsement;

(2) In the case of an applicant for a Merchant Mariner's Document, notify him of the Commandant's refusal to issue such document; or

(3) In the case of a holder, revoke and require the surrender of his special validation endorsement.

(c) Such applicant or holder shall be notified of his right, and shall have 20 days from the receipt of such notice within which, to appeal under this part.

§ 121.23 *Appeals.* (a) The Commandant shall establish at Coast Guard Headquarters, Washington, D. C., an Appeal Board to hear appeals provided for in this part. The Commandant shall designate for the Appeal Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a member from a panel of persons representing management nominated by the Secretary of Labor, and a member from a panel of persons representing labor nominated by the Secretary of Labor. The Commandant shall insure that persons designated as Appeal Board members have suitable security clearance. The Chairman of the Appeal Board shall make all arrangements incident to the business of the Appeal Board.

(b) If an applicant or holder appeals to the Appeal Board within 20 days after receipt of notice of his right to appeal under this part, his appeal shall be handled under the same procedure as that specified in § 121.15 and the privilege of challenge may be exercised through the same procedure as that specified in § 121.17.

(c) Appeal Board proceedings shall be conducted in the same manner as that specified in § 121.19.

§ 121.25 *Action by Commandant after appeal.* (a) If, upon receipt of the Appeal Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Appeal Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall notify the applicant or holder that his appeal is denied.

§ 121.27 *Outstanding endorsements and applications* (a) All special validation endorsements for emergency service entered upon Merchant Mariner's Document will be accepted as valid until cancelled, revoked, or suspended by proper authority.

(b) A person who has filed an application for a Merchant Mariner's Document bearing a special validation endorsement for emergency service and who has not received such an endorsement prior to May 1, 1956, shall submit a new application in accordance with the requirements of this part.

§ 121.29 *Applications previously denied.* A person who has been denied a Merchant Mariner's Document bearing

a special validation endorsement for emergency service, before May 1, 1956, may file a new application for such an endorsement in accordance with the requirements of this part.

It is hereby found that compliance with the notice of proposed rule making, public rule making procedures thereon, and effective date requirements of the Administrative Procedure Act is contrary to the public interest since this revision of 33 CFR Part 121 is to implement more effectively Executive Order 10173, as amended, and in the public interest should be placed in operation as soon as possible. This amendatory regulation shall become effective May 1, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1105

JOSEPH CLINTON MCBRIDE, PETITIONER

v.

WILLARD SMITH, COMMANDANT, UNITED STATES COAST GUARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a–24a) is reported at 248 F. Supp. 459. The opinion of the court of appeals (Pet. App. 25a–32a) is reported at 369 F. 2d 65.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1966. The petition for a writ of certiorari was filed on March 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(i) (1964).

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Magnuson Act, 64 Stat. 427 (1950), as amended, 50 U.S.C. 191 (1964), and the applicable regulations (33 C.F.R. 6.10–1, 6.10–3, 6.10–9, and 121.01–121.29) are set forth in Appendix C to the petition, pp. 33a–53a.

QUESTIONS PRESENTED

1. Whether the Magnuson Act, 50 U.S.C. 191, authorizes the creation of the Coast Guard's merchant seamen's screening program here involved.

2. Whether the regulations pursuant to which the Commandant acted in this case satisfy the constitutional requirements of definiteness and procedural due process.

3. Whether the evidence—which shows that petitioner was long an active and knowing member of the Communist Party—supports the Commandant's denial of a special validation endorsement of petitioner's merchant mariner's document on the ground that he was not satisfied that petitioner's "presence on board vessels of the United States would not be inimical to the security of the United States" within the meaning of 33 C.F.R. 6.10–1 and 121.25.

STATEMENT

1. On July 10, 1959, petitioner applied to the Commandant of the Coast Guard to have his merchant mariner's document "specially validated" (J.A. 117a).[1] Together with the application, petitioner re-

[1] The Coast Guard issues merchant mariner's documents to those who wish to seek employment on commercial vessels flying the United States flag. Apart from the screening program here

turned a printed questionnaire, filled in by him, which called for disclosure of past and present membership in designated [2] organizations, including the Communist Party. Petitioner stated only that he had been a member of the International Workers Order (J.A. 119a–21a). By letter of October 15, 1959 (J.A. 122a), the Commandant informed petitioner that additional information was required in order to determine petitioner's eligibility for a specially validated document. Enclosed with the letter were detailed interrogatories, the answers to which petitioner executed on March 29, 1960 (J.A. 124a–128a). In his answers, petitioner acknowledged membership in the Communist Party from 1938 through 1950. He denied Party membership for all other years (J.A. 124a). In addition, petitioner admitted the following: employment at Communist Party Headquarters from 1948 to 1959 (J.A. 127a); participation in the 1951 and 1952 May Day Parades in New York City (J.A. 124a); participation in the 1942 Communist Party election campaign (J.A. 124a); registered affiliation with the American

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in question, the documents serve to identify seamen, who are not required to carry passports. In addition, a merchant mariner's document shows the seaman's rating and qualification for certain positions aboard ship, such as engineer, mate, and the like, ratings determined by a seaman's experience and by results of tests administered by the Coast Guard as part of a broad program to insure the safety of merchant vessels and crew. See also, pp. 17–18, *infra*.

References ("J.A.") are to the parties' joint appendix in the court of appeals. We are also lodging the administrative file, which was also presented to the courts below.

[2] "Designated" by the Attorney General under Executive Order 10450, 18 F.R. 2489.

Labor Party from 1949 through 1954 (J.A. 125a); signing a nominating petition for Elizabeth Gurley Flynn in her 1957 campaign for the New York City Council (J.A. 126a); attendance in 1957 at the New York State Communist Party convention (*ibid.*), and other Communist Party conventions (*ibid.*).

By letter of November 23, 1960 (J.A. 107a–112a), the Commandant notified petitioner that he was not satisfied that petitioner's presence on board vessels of the United States would not be inimical to the security of the United States. The Commandant listed 25 reasons for his conclusion (*ibid.*), all relating to petitioner's activity and membership in the Communist Party and other groups "subversive or disloyal to the United States" (J.A. 107a). The Commandant's letter informed petitioner of his right to file an answer and to request a hearing, which petitioner did on December 22, 1960 (J.A. 114a–115a).

2. A hearing was held on November 28, 1962, and May 14, 1963. The Hearing Board consisted of a civilian hearing examiner in the employ of the Coast Guard, a labor representative, and a management representative (J.A. 101a–105a; see 33 C.F.R. 121.13). Both petitioner, through his counsel, and the government presented witnesses and exhibits and had the right of cross-examination. A summary of the relevant evidence follows.

Petitioner, a Negro, was born in Florida in 1911, and during his childhood had three years formal education at a Bible school (J.A. 79a). He came to New York in 1932, and in 1936 joined the Communist Party (J.A. 81a, 82a). After having joined the Party,

petitioner learned to read and write under the tutelage of a Party member (J.A. 84a, 96a). In the late 1930's, he attended the "Daily Worker School known as the Jefferson School" for four or five weeks (J.A. 84a).[3] There he was taught the principles of Marxism and Leninism as well as "how to bring about a solution to the Negro question" (J.A. 85a). At the school, petitioner attended lectures by various Communist Party leaders and teachers (J.A. 85a). He was given various Communist publications to study (J.A. 85a–86a).

In 1948, petitioner began working as an elevator operator and night watchman at Communist Party Headquarters; the employment continued through August 4, 1960 (J.A. 89a, 90a). One of petitioner's two character witnesses (see pp. 7–8, *infra*), testified that petitioner left the job when the realty company that held title to the premises "went out of business or gave up the building or something" (J.A. 68a). However, petitioner's employment at Communist Party Headquarters apparently required membership in the Party (J.A. 37a, 90a).[4] Petitioner explained that the Party continued to employ him beyond 1957, the year in which he claimed to have left the Party

[3] See *Jefferson School of Social Science* v. *Subversive Activities Control Bd.*, 331 F. 2d 76 (C.A. D.C.).

[4] Petitioner testified (J.A. 89a–90a):

> Q. How long did you work at 35 E. 12th Street?
>
> A. Eleven years.
>
> Q. You quit when? A. On August 4, 1960.
>
> Q. Did you have to be a member of the Communist Party in order to hold a job there? A. The whole ninth floor was the National Committee for the Communist Party.

* * * * * *

(J.A. 90a), because only his group branch knew that he had ceased being a Party member (J.A. 90a–91a). Petitioner admitted attending Communist Party Club meetings during the late 1940's and early 1950's (J.A. 129a). Sometime subsequent to 1941 he became a member of the Waterfront Section of the Party (J.A. 89a). He attended Communist Party state and national conventions as late as 1957 (J.A. 91a, 126a). He adhered to the Party position against United States involvement in the Korean War (J.A. 94a–95a), and was employed by the Party for two months in 1950 in organizing a peace demonstration for May Day 1950 (J.A. 97a).[5] In addition, petitioner signed various nomination petitions for Communist Party members (J.A. 124a, 126a), and attended Communist Party camps where lectures were regularly given in Communist doctrine (J.A. 125a–127a; 53a–55a).

Petitioner testified that while a Party member, he learned that the Communist Party advocated the overthrow of the present form of government in this country (J.A. 87a–88a).[6]

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[5] Petitioner also participated in the May Day Parades in New York City in 1951 and 1952 (J.A. 124a). He testified that his activities for the Party included general political work, picketing, passing out leaflets, selling the *Daily Worker* and working at rallies (J.A. 83a).

[6] Petitioner qualified his adherence to the Party's views, as follow (J.A. 87a–88a):

> Q. Did you learn that the Communist Party advocated the overthrow of the present form of government? A. Yes.
>
> Q. And you, of course, were a member? A. I was at one time.
>
> Q. Would [you] have participated in such a revolution? A. Would I? It is hard to say. To tell you the truth it is

Petitioner testified that he had joined the Party and had remained in it solely because "the Communists * * * were supposed to help the cause of the Negro" (J.A. 82a). He said he left the Communist Party in 1957 because "the Communist Party was not alert and on the ball on the Negro question" (J.A. 83a). He also testified, however, that he first became disenchanted with the Party during World War II (J.A. 86a), and again in 1951 (J.A. 130a), but did not leave the Party until the John Gates schism occurred in 1957 (J.A. 92a, 130a).[7] He further testified that when he did leave, "I didn't change my ideas [about the Party]" (J.A. 93a), but rather left it because it was "not interested in the Negro question as far as I could see" (*ibid.*).[8]

At the hearing, petitioner presented two character witnesses. The first, Patricia Mae Buitoni, stated that she knew petitioner well since 1947 (J.A. 62a); her

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hard to say what I think now and what I thought then. It is hard to say.

Q. If the Communists did start a revolution what would you do? A. Go on the side of the Americans.

Q. Would you fight against the Communists? A. Of course I would.

[7] John Gates was a member of the National Committee of the Party and Editor of the Daily Worker. On January 10, 1958, he broke with the Party reportedly because he felt it had ceased to be an effective force in the United States and was too subservient to foreign powers. See N.Y. Times, Jan. 11, 1958, p. 1, col. 5; Hoover, *Masters of Deceit* (1958), 77, 165.

[8] At the hearing petitioner was asked: "Do you today participate in any NAACP or CORE meeting in this area?" He answered: "No more than go to meetings. I go to some of the outdoor meetings when I get the chance. I also make donations." (J.A. 99a.)

testimony tended to support that of petitioner as to his reasons for being a member of the Party, and as to the fact that he had terminated his membership (J.A. 63a). The second character witness, Ed Woodhead, testified that he first met petitioner late in 1959 or early 1960 in a neighborhood bar (J.A. 70a, 76a). He attested that petitioner had told him he had joined the Party because it "seemed to offer an answer for this problem [of prejudice against Negroes]" (J.A. 71a). However, Woodhead's knowledge of petitioner was almost wholly confined to conversations with him during occasional meetings at the bar (J.A. 76a–77a, 87a).

Petitioner was a merchant seaman until 1948, when he married and decided not to return to sea (J.A. 89a). His rating on board ship was "[s]tewards department, messman, assistant cook, second cook, baker" (J.A. 98a).

3. On October 14, 1963, the Commandant denied petitioner's application for special validation endorsement of his merchant mariner's document, on the ground that he was not satisfied that petitioner's "character and habits of life are such as to authorize or warrant the belief that your presence on board a merchant vessel of the United States would not be inimical to the security of the United States" (J.A. 32a). He based this conclusion on a finding that "[f]or more than twenty years, beginning in 1936 when you joined the Communist Party, you were knowingly and sympathetically associated and affiliated with the Communist Party as demonstrated by your active participation in the Communist Party and

in Communist Party-inspired organizations and activities" (J.A. 29a). The Commandant further stated to petitioner that "you were well indoctrinated in and fully realized, accepted, and approved the aims and objectives of the Communist Party, including the overthrow of the present form of Government in the United States by force and violence and Communist domination of the World" (J.A. 32a). In his decision, the Commandant listed, as supporting reasons, the various activities in which petitioner had acknowledged participation (J.A. 29a–32a).

The Commandant did not credit petitioner's testimony that he joined the Communist Party because he thought the Communists would help the cause of the Negro. He stated that petitioner's testimony "that in the 1940's and again in 1951 you became disillusioned with the Communist Party because you felt 'they were not alert and on the ball on the Negro question' is negated by your continued association with and participation in the Communist Party and its activities long afterwards" (J.A. 32a).

The Commandant also did not credit petitioner's testimony that he left the Communist Party in 1957. The basis for his disbelief lay in the fact that petitioner was employed at Communist Party Headquarters from 1948 to 1960, and that the record showed (see J.A. 37a, 89a–90a) that such employment would not have been available to a non-Communist (J.A. 31a).

The Commandant informed petitioner that he had the right to appeal his decision within twenty days (J.A. 32a–33a). Petitioner did so appeal, but waived

the right to appear personally or by counsel before the Appeal Board, electing to rely on the record below. The Appeal Board recommended affirmance of the Commandant's decision, and the Commandant, on March 3, 1964, adhered to his decision (J.A. 34a). The present suit followed.

The district court dismissed petitioner's complaint, holding that the Commandant acted "reasonably and properly" in denying special validation of petitioner's merchant mariner's document (Pet. App. 24a; 248 F. Supp. 459). The court of appeals affirmed (Pet. App. 25a–32a; 369 F. 2d 65).

ARGUMENT

1. The Magnuson Act, 50 U.S.C. 191 (Pet. App. 33a–34a), provides *inter alia,* that whenever the President finds that the security of the United States is endangered by certain events, including "subversive activities," he "is authorized to institute such measures and issue such rules" as necessary: (a) to take full possession and control of vessels and to remove any person not specifically authorized by him to go or remain aboard if in his opinion it is necessary to prevent damage or injury to a vessel, any harbor, or waters of the United States, or to secure observance of rights or obligations of the United States, and (2) to safeguard against destruction, loss or injury from sabotage or other subversive acts, vessels, harbors, ports and waterfront facilities.

Pursuant to this Act, the President issued Executive Order 10173, 15 F.R. 7005, on October 18, 1950. Having found that the security of the United States

was endangered by reason of subversive activities, he promulgated certain regulations, one of which authorized the Commandant of the Coast Guard to require every person employed on a merchant vessel of the United States to have a merchant mariner's document bearing a special validation endorsement for emergency service. The Commandant was empowered to prescribe the forms, contents and manner of issuance, to revoke or require surrender of such validated endorsement, and he has implemented his authority through further regulations (see 33 C.F.R. 6.10–1, 6.10–3, 6.10–9, and 121.01–121.05).

Under these regulations, the Commandant must decide whether he is satisfied that "the character and habits of life" of the applicant are such as to warrant the belief that his presence on board vessels of the United States "would not be inimical to the security of the United States" (33 C.F.R. 6.10–1, 121.25). The regulations set out procedures for the handling of applications for special validation endorsement, including the right to a hearing and appeal at three levels. Section 121.03 of the regulations sets out as "standards" certain categories of relevant information which "may preclude" a favorable determination to the applicant. These include acts of the applicant such as (a) advocacy of the overthrow or alteration of the government of the United States by unconstitutional means; (b) commission of or attempts to commit, espionage, sabotage, sedition or treason; (c) performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the government of the

United States; (d) deliberate unauthorized disclosure of classified defense information; (e) membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to E.O. 10450, as amended. These standards do not purport to be all-inclusive, and the Commandant may consider any such information along with other information relevant to the question whether the applicant's presence aboard a vessel would be inimical to the security of the United States.

Every court that has considered the question has held that the Magnuson Act authorizes the screening program outlined above (compare Pet. 28), although the early decisions found some procedural deficiencies in the former regulations. See, *e.g.*, *Graham* v. *Richmond*, 272 F. 2d 517, 521 (C.A. D.C.); *Parker* v. *Lester*, 227 F. 2d 708, 715 (C.A. 9);[9] *United States* v. *Gray*, 207 F. 2d 237, 241 (C.A. 9); cf. *United States* v. *Aarons*, 310 F. 2d 341 (C.A. 2). Thus, Congressional authorization for the program is not only, in the words of the court below (369 F. 2d at 69), "quite plain" from the broad language of the Act and its legislative history,[10] but, also, it is an issue now well-settled.

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[9] Following the decision in *Parker* v. *Lester*, the regulations were amended to insure that the applicant receive a fair resumé of the information adverse to him and an adequate hearing in which to challenge that information.

[10] See 96 Cong. Rec. 10794–10795 (July 21, 1950) (remarks of Senator Magnuson); S. Rep. No. 2118, 81st Cong., 2d Sess. (1950). See also, Brown and Fassett, *Security Tests for Maritime*

2. Petitioner also contends that the regulations are unconstitutionally vague (Pet. 26–28), and that the program is otherwise infirm because it "departs so substantially from traditional norms of fair procedure" (Pet. 29).

a. As we have pointed out, the regulations require that the Commandant satisfy himself from "the character and habits of life of the individual," that the latter's presence on board a vessel would not be "inimical to the security of the United States." One factor the Commandant may consider is the applicant's "[m]embership in, or affiliation or sympathetic association with" any organization on the so-called Attorney General's list. The Commandant has construed his regulation, as indeed its language clearly connotes, to require "knowing" rather than "mere" membership, in order to be considered as adversely affecting the individual's application for a document. In that light, the regulations are sufficiently definite to withstand petitioner's attack, which the court below properly termed "not well taken" (369 F. 2d at 69).[11]

As the Court of Appeals for the District of Columbia Circuit said in reference to a similar screening program also administered by the Coast Guard (for radio-telegraph operators in the merchant marine), one which uses a similar standard—"character," "habits of life," and "suitable and safe person"—

Workers: Due Process Under the Port Security Program, 62 Yale L.J. 1163, 1188 (1953). Since the Act was passed as an emergency measure during the Korean crisis, its legislative history is limited.

[11] See also *Aptheker* v. *Secretary of State*, 378 U.S. 500, 511.

> Other important public affairs are administered under statutory language no more precise, such as a finding of "public interest, convenience and necessity," or "restraint of trade," or "unfair methods of competition." While these examples do not relate to matters of individual liberty, they are, on the other hand, more indefinite than the criteria of the present statute.

Homer v. *Richmond,* 292 F. 2d 719, 723 (C.A. D.C.).

The regulations may not set forth a "neat, mathematical formulary," *Dennis* v. *United States,* 341 U.S. 494, 515, but they sufficiently and fairly inform both those administering the program and those who seek to challenge any adverse determination. See *American Communications Assn.* v. *Douds,* 339 U.S. 382, 412; *Killian* v. *United States,* 368 U.S. 231, 258.

b. Nor is there merit to petitioner's complaint that the procedure prescribed is inadequate (Pet. 29). We think it clear that there is no lack of due process in the scheme. An application is first considered by the Commandant. Should he deny it, the application is, if requested, considered by a Hearing Board, and the applicant is given the opportunity to offer evidence in a hearing at which he may present witnesses and at which he is afforded the rights to confrontation and counsel. That Board makes an independent recommendation to the Commandant. Should the latter adhere to his decision, the applicant may appeal to an Appeal Board, which may conduct an additional hearing, following which it similarly makes a recom-

mendation to the Commandant. The court below held (369 F. 2d at 68):

> "Procedurally, there is no lack of due process in the statutory scheme, with opportunity to present evidence and cross examine adverse witnesses before the Boards, determination by the Commandant at each stage * * *."

In our view, that holding was clearly correct, and does not warrant further review.

3. Petitioner further contends (Pet. 20–25) that he may be denied special validation of his mariner's document only if it is shown that he has a specific intent to further the illegal objectives of the Communist Party or has personally participated in the organization's illegal activities. But his reliance upon *Elfbrandt* v. *Russell*, 384 U.S. 11, *Aptheker* v. *Secretary of State*, 378 U.S. 500, and apparently upon *Scales* v. *United States*, 367 U.S. 203, and *Noto* v. *United States*, 367 U.S. 290, is misplaced. All of those cases involved in effect penal statutes. *Scales* and *Noto* were prosecutions under the membership clause of the Smith Act, 18 U.S.C. 2385, which the Court, to avoid constitutional difficulties, construed to apply only to "knowing" and "active" membership in the Communist Party, accompanied by "specific intent". *Aptheker* concerned Section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. 785, which provided that when a Communist organization is registered, or under final order to register, it shall be unlawful for any member, with knowledge or notice thereof, to apply for or use a passport.[12] The court

[12] The maximum punishment for a violation of Section 6 was $10,000 and five years imprisonment. 50 U.S.C. 794(c).

held Section 6 unconstitutional on its face because it lacked the "knowing," "active," and "specific intent" elements. In so holding, the court pointed to "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application" (378 U.S. at 516).[13] In *Elfbrandt,* the court dealt with an Arizona statute which provided that a public employee required to take an oath to support the federal and State constitutions and the State laws was subject to prosecution for perjury and to discharge from office if he "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations" or "any other organization" having for "one of its purposes" the overthrow of the State government where the employee had knowledge of the unlawful purpose. The court, citing *Scales, Noto* and *Aptheker,* held the statute unconstitutional because it did not require a specific intent to further the illegal action of the organization.[14]

To be sure, this Court's recent opinion in *Keyishian* v. *Board of Regents,* 385 U.S. 589, makes clear, as *Elfbrandt* and *Aptheker* also indicate, that the presence or absence of a criminal penalty in the statutory scheme, or its application, is not the sole touchstone for decision. But the vice of the statutory scheme held invalid in *Keyishian* was the "impermissible over-

[13] Quoting from *NAACP* v. *Button,* 371 U.S. 415, 433.

[14] The court noted (384 U.S. at 18, 19) that a penal statute touching rights protected by the First Amendment must be "narrowly drawn to define and punish specific conduct * * *" (quoting from *Cantwell* v. *Connecticut,* 310 U.S. 296, 311).

breadth" and "vagueness" of its "regulatory maze," through which the individual teacher was forced to transude (385 U.S. at 609, 599, 604). No such objections can be made to the merchant marine screening program. Moreover, the statute involved in *Keyishian* made mere membership in the Communist Party prima facie evidence of disqualification. In contrast, it is hardly to be contested that petitioner here was an active and knowing member of the party, for as the court below held (369 F. 2d at 68):

> The evidence amply supports the Commandant's finding:
>
> 'that you [petitioner] were well indoctrinated in and fully realized, and approved the aims and objectives of the Communist Party, including the overthrow of the present form of Government in the United States by force and violence * * *.'

From the inception of the Nation, shipping has been a matter of great governmental concern, stemming from the importance of seapower as an agency of commerce and of national defense. Every aspect of shipping, including ship construction, preparation of ships for service, and procurement and qualifications of personnel, is closely regulated. See Gilmore and Black, *The Law of Admiralty,* 778–782 (1957). Quite naturally, the government—which regulates and subsidizes shipping, and provides training facilities for shipping personnel, see 46 U.S.C. 1126—will seek to assure the safety of shipping from subversive activity. Reasonable preventive measures must be taken to that end, among them the denial of clearance to seamen who, like petitioner, have held long and mean-

ingful membership in the Communist Party. To require a showing of specific intent to further the unlawful aims of the Party would seriously impair the effectiveness of the program.[15] We submit that the decisions upon which petitioner relies do not require that result.[16]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1967.

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[15] We note also that *Elfbrandt* and *Keyishian* involved quite direct restrictions upon the dissemination of ideas—upon academic freedom, which this Court in *Keyishian* termed "a special concern of the First Amendment" (385 U.S. at 603). Doubtless, the denial of access to limited areas of employment affecting the national security might have, in some cases, a deterrent effect upon the free expression of ideas, but it cannot be considered that kind of wholesale infringement involved in *Elfbrandt*, *Keyishian*, and to a lesser extent, *Aptheker*, in all of which "less drastic" alternatives were available.

[16] Our position here is quite similar to that in *United States* v. *Robel*, No. 83, this Term; see the government's brief in that case, pp. 40–48. Should *Robel* be affirmed, this case we submit follows *a fortiori*. However, should the Court hold that the criminal prosecution in *Robel* is constitutionally infirm for failure to include the element of specific intent, discrete arguments may be available to support the preventive program here at issue.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1105

JOSEPH CLINTON McBRIDE,

Petitioner,

—v.—

WILLARD SMITH, Commandant, United States Coast Guard,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Joseph Clinton McBride prays that this Court grant rehearing of its order of May 29, 1967, denying the petition for a writ of certiorari, 35 U. S. L. Week 3419, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the petition filed March 1, 1967, herein.

Reasons for Granting Rehearing and Issuing the Writ

1. On May 26, 1967, the Friday immediately preceding the Monday on which the writ of certiorari was denied in this case, an appeal was docketed in *Schneider* v. *Smith*, No. 1427. That appeal was from a judgment of a statutory three-judge district court for the Western District of

Washington, dismissing a complaint which sought a declaration of unconstitutionality of the same statute and regulations drawn into issue in the case at bar.

Appellant in *Schneider*, like petitioner in the instant case, is a qualified and licensed merchant mariner. In October, 1964 he applied to the United States Coast Guard office in Seattle for renewal and validation of his merchant mariner's document. The Coast Guard refused to process his application or to validate his merchant mariner's document, which is required as a condition of his employment as a merchant seaman, unless he answered under oath questions about his present and past political activities and beliefs. Specifically, appellant was initially requested as part of his application to answer under oath the question: "Are you now, or have you ever been, a member, or affiliated, or associated with in any way . . ." any of the approximately 300 organizations named by the Attorney General as "subversive". He answered "Yes", and added an explanation: "I have been a member of many political and social organizations, including several named on this list. I cannot remember the names of most of them and could not be specific about any. To the best of my knowledge I have not been a member or participated in the activities of any of these organizations for ten years."

The Coast Guard took no action of any kind on appellant's application until an inquiry was made on his behalf by his attorney. A reply from the Coast Guard excused the delay on the grounds of appellant's "reluctance to furnish names and dates of his membership in several of the organizations which have been designated by the Attorney General . . .", but "anticipated that action will be taken

in the near future." Subsequently, the Coast Guard sent a set of interrogatories to the appellant to be answered under oath. These interrogatories asked a number of questions relating to appellant's membership in political and social organizations, the nature of his activities in those organizations, his reason for discontinuing membership, and his present attitude towards the principles and objectives of the organizations. Appellant refused to answer these interrogatories and was advised by the Coast Guard that no further action would be taken on his application until and unless the interrogatories were answered. He thereupon filed his complaint.

The authority upon which appellee relied in *Schneider* was identical to the authority relied upon in the case at bar to deny petitioner, in this case after hearing, a validated merchant mariner's document: namely, the Magnuson Act, 64 Stat. 427 (1950), 50 U. S. C. §191 (1964); and 33 CFR §§6.10-1, 6.10-3, 6.10-9, 121.01–121.29.

By Rule 58 of the Rules of this Court, a petition for rehearing will be entertained where the stated grounds are based upon "intervening circumstances of substantial or controlling effect." One intervening event which has been thought to justify reconsideration of an order denying a petition for a writ of certiorari is that the same issue has come before the Court in another case still pending. *Pickett* v. *Union Terminal Company*, 313 U. S. 591, 314 U. S. 704, 315 U. S. 386, 394. This follows from the terms of Rule 19, Rules of the Supreme Court of the United States, which states that one of the considerations governing review on certiorari is whether a lower federal court has decided an important question of federal law which has not been, but which should be, settled by this Court.

Whether such a question is "important" within the meaning of Rule 19 is determined, among other ways, by considering whether the issue is or is not "too moribund for judication," whether "the question had better await the perspective of time," or whether "time would soon bury the question." *Darr* v. *Burford*, 339 U. S. 200, 227 (Frankfurter, *J.*, dissenting).

The fact that another case raising issues almost identical to those presented by the case at bar has been filed in this Court within three months after the instant case was itself filed, is substantial evidence that the federal questions they present are current, important, and far from moribund.

It is not invariably true, of course, that a grant of certiorari is justified only because of the coincidental filing of two closely related cases within a short period of time. But there are additional reasons which justify reconsideration of the denial of certiorari in this case, reasons which show that *Schneider* and the instant case are only illustrative of a widespread national problem which warrants the attention of this Court.

By virtue of the decisions of the United States Court of Appeals for the Second Circuit and the United States District Court for the Western District of Washington, the United States Coast Guard is authorized to make it impossible for petitioner and appellant in *Schneider* to follow their chosen profession solely because of their alleged past political beliefs and associations. But the impact of loyalty-security measures which effectively deny a man or woman employment is by no means confined to Mr. McBride or Mr. Schneider.

Government programs designed to serve the "interests of the national security" (Executive Order 10450, 18 Fed. Reg.

2489 (1953), 3 CFR (1953 Supp.) 72, 5 U. S. C. §631 note) are embedded in our society and affect literally millions of persons. Furthermore, each of the existing security programs, among their other defects, contain the identical vague standards for determining whether one is a "security risk" as are contained in the Coast Guard's port security program.

These security programs affect all government employees, all members of the Armed Forces, United States employees of international organizations, and large numbers of employees in private industry.

Government Employees.

Department of Defense Directive, BNA,* Section 15:121-128M, at 124-128.

Department of the Army, BNA, Section 15:131-160, at 139-141.

Department of the Navy, BNA, Section 15:181-221, at 193-194.

Department of the Air Force, BNA, Section 15:251-275, at 256-258.

Post Office Department, BNA, Section 15:291-298, at 291-293.

Treasury Department, BNA, Section 15:301-311, at 302-303.

Department of Justice, BNA, Section 15:321-329, at 321-322.

Veterans Administration, BNA, Section 15:341-348, at 341-342.

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* Bureau of National Affairs, Manual of Government Security and Loyalty.

Department of Agriculture, BNA, Section 15:361-378, at 362-363.

Department of Commerce, BNA, Section 15:391-400, at 391-392.

Department of Labor, BNA, Section 15:411-418, at 411-412.

Department of the Interior, BNA, Section 15:431-440, at 433-434.

Civil Service Commission, BNA, Section 15:451-458, at 451-453.

Tennessee Valley Authority, BNA, Section 15:511-522, at 516-518.

Atomic Energy Commission, BNA, Section 15:531-539, at 533-534.

Department of State, BNA, Section 15:541-549, at 542-543.

Department of Health, Education & Welfare, BNA, Section 15:561-568, at 562-563.

National Aeronautics & Space Administration, BNA, Section 15:905-920, at 907-908.

See too Civil Service Handbook: Guide for Members of Security Hearing Boards Under Executive Order 10450, BNA, 15:569-582, at 579-580; and Department of Justice, Sample Security Regulations, BNA, Section 15:101-108, at 102-103.

Armed Forces Personnel.

Department of Defense Directive, 5210.9, BNA, Section 31: 51-58, at 53-54.

United States Army, BNA, Section 31:71-84, at 73-75.

United States Navy, BNA, Section 31:111-130, at 113-114.

United States Air Force, BNA, Section 31:161-182, at 164-166.

United States Employees of International Organizations.

Executive Order 10422, 18 Fed. Reg. 239, 2183 (1953), BNA, Section 41:31-35, at 33-34; BNA, Section 41:41-44, at 42.

Employees in Private Industry.

Executive Order 10865, 25 Fed. Reg. 1583, BNA, Section 24:11.

See too Armed Forces Industrial Security Regulations, BNA, 25:1-1; Industrial Personnel Access Authorization Review Regulations, 32 CFR §§155, et seq., BNA, Section 25:151-166K, at 159-161; implementing regulations of the Army, Navy and Air Force: BNA, Sections 25:167, 243, 177, 246; 26:1; 25:242.

The impact of these security programs is felt by a very large number of persons. In 1958 it was estimated that they affected 8,500,000 persons, including about 2,300,000 in federal civilian employment, 3,000,000 in the armed forces, 3,000,000 under the Industrial Security Program, and several hundred thousand under the Port Security Program. As of 1958, Professor Ralph Brown estimated that about 13,500,000 persons were covered by federal, state, local and private security programs. He said, "Taking the total labor force at about 65,000,000, this means that at least one person out of five, as a condition of his current employment, has taken a test oath, or completed a loyalty statement, or achieved official security clearance, or survived some undefined private scrutiny." Brown, *Loyalty and Security,*

164-181 (1958). It has recently been noted in addition that "since 1958 there have been substantial increases in the number of federal, state and local employees, persons in the armed services, and workers covered by the Industrial Security Program. Moreover, the above [Brown] figures represent, of course, only the *current* numbers subject to loyalty tests. They do not take into account the turnover in employment. Thus, from the introduction of the Truman program in 1947 to its supersession by the Eisenhower program in 1953, some 4,756,705 federal employees were checked for loyalty under Executive Order 9835. Civil Service Commission, 1953 Annual Report, p. 32; for further figures, see Special Committee of the Association of the Bar of the City of New York, The Federal Loyalty-Security Program, App. A. (1956). From 1954 through 1962, over 2,500,000 persons were given loyalty checks for federal government employment and 250,000 were given full field investigations. Civil Service Commission, Annual Reports 1954-1962. The figures do not take into account the impact of the exposure to loyalty tests upon members of the family, dependents, and the like." Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* (3rd Ed.), pp. 353-354 (1967).*

In *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 901, Mr. Justice Brennan, in a dissent concurred in by Mr. Chief Justice Warren, Mr. Justice

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* Prof. Brown made a very "rough" estimate that up to 1958 11,500 individuals had, as a consequence of loyalty-security programs been dismissed, denied clearance, or excluded from a calling that was equivalent to dismissal. The total included 3,900 federal employees including military personnel and 5,400 private employees subject to federal programs. The remaining 1,200 were attributable to state and local government employees and self- and privately employed persons. Brown, *id.* at 181-182, 487-488.

Black and Mr. Justice Douglas, characterized the designation of an individual as a "security risk" as the "most odious in our times." Given the length and breadth of the security programs, their effect upon millions of individuals, as well as their effect upon the nation as a whole, this Court should undertake at least to decide whether the "odious" designation of a man as a security risk can be affixed to him under the vague standards employed in the case at bar.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

MELVIN L. WULF
Counsel for Petitioner

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 in the Rules of this Court.

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